Supreme Court, U.S.
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No. 02-737

IN THE

Supreme Court of the United States

HAROLD E. STEELE, DON PETERSON,
REV. DAVID MAYNARD, HARMON WRAY,
AND REV. TOM BAKER, JR.,
Petitioners,

v.

INDUSTRIAL DEVELOPMENT BOARD OF
METROPOLITAN GOVERNMENT OF NASHVILLE AND
DAVIDSON COUNTY, METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY,
DAVID LIPSCOMB UNIVERSITY,
NATIONSBANK AND NATIONSBANK/TENNESSEE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the low interest loan, funded by tax exempt revenue bonds, made by the Industrial Development Board of the Metropolitan Government of Nashville and Davidson County, to David Lipscomb University, a pervasively sectarian institution, was direct state aid in violation of the Establishment Clause of the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Don Peterson, Reverend David Maynard, Harmon Wray and Reverend Tom Baker, Jr., respectfully request a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as *Steele v. Industrial Dev. Bd. of Metropolitan Government*, 301 F.3d 401 (6th Cir. 2002). [App. A]. The opinion of the District Court is reported as *Steele v. Industrial Dev. Bd. of Metropolitan Government*, 117 F.Supp.2d 693 (M.D. Tenn. 2000). [App. B].

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on August 14, 2002. [App. A].

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) and Rule 10(c), Rules of the Supreme Court United States, for a writ of certiorari to review this decision which conflicts with the Supreme Court's prior Establishment Clause decisions in *Tilton v. Richardson*, 403 U.S. 672 (1971), *Hunt v. McNair*, 413 U.S. 734 (1973), and *Roemer v. Board of Publ. Works of Maryland*, 426 U.S. 736 (1976), holding that state aid has the primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in its religious mission. *Hunt, supra* at 743.

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[1] The lead Plaintiff, Harold E. Steele, is no longer a party as a result of his death on April 1, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion...."

Title 42, United States Code, § 1983 provides in pertinent part:

> Every person who, under the color of any statute, ordinance, regulation, custom or usage of any State..., subjects, or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress...."

STATEMENT OF THE CASE

Petitioners are state and local tax payers residing in Nashville, Tennessee who contend that the issuance of tax exempt revenue bonds by the Industrial Development Board of the Metropolitan Government of Nashville and Davidson County ("the Board") for David Lipscomb University ("Lipscomb") provides an impermissible direct economic benefit to a pervasively sectarian institution in violation of the Establishment Clause of the First Amendment of the United States Constitution.

During the early 1990's, Lipscomb undertook a major redevelopment project on its campus. To finance the project, Lipscomb sought a $15 million, low-interest loan from the Board. The Board approved the loan and financed it by issuing tax exempt industrial development bonds worth $15 million. The bond issue was also approved by Metro's Mayor Bill Boner as federally tax exempt. The loan from the proceeds of the bonds was used in part to construct and

equip a new library, to renovate and convert the old library into administrative offices, and to construct a new intramural athletics building ("or student activities center"), four new tennis courts, a new baseball stadium, an intramural field, and an addition to the school's Business Center. [App. B, 83a-84a].

The bonds are typical of industrial revenue bonds that are commonly issued for educational or industrial purposes. The bonds were issued by the Board pursuant to its authority under state law to issue bonds for the financing of projects for "[a]ny nonprofit educational institution in any manner related to or in furtherance of the educational purposes of such institution, including but not limited to classroom, laboratory, housing, administrative, physical education, and medical research and treatment facilities." Tenn. Code Ann. § 7-53-101(11)(A)(vii) (1990 Supp.).

Because the bonds were issued as education revenue bonds by the Board, the income produced by the bonds is exempt from state taxation. In addition, the bonds were approved by both the Board and the Metropolitan Government of Nashville and Davidson County's ("Metro") Mayor under the provisions of 26 U.S.C. § 103 (1994), making the interest on the bonds federally tax exempt. Consequently, the bonds carried a lower interest rate than conventional financing, and Lipscomb realized the financial benefit through the resulting lower interest rate on its loan from the Board. [App. B, 84a].

Although the Board is an instrumentality of Metro, the bonds do not constitute an indebtedness of either the Board or Metro. [App. B, 86a]. Neither the Board nor Metro can be held liable to pay any portion of the principal or interest on the bonds or any costs incident to their issuance. Tenn. Code Ann. § 7-53-306 (1985). No state or local government

tax revenues have been or will be spent as a result of the issuance of the bonds. [App. B, 86a].

Petitioners and/or their counsel objected to the issuance of the bonds as violating the Establishment Clause at public hearings and meetings of the Board held on April 10, 1990, April 16, 1990, May 30, 1990 and January 22, 1991. [App. B, 86a]. When the bonds were approved over their objection, petitioners filed suit in the United States District Court for the Middle District of Tennessee on May 30, 1991, challenging the validity of the Board's action in issuing tax exempt revenue bonds for the benefit of Lipscomb.

Lipscomb filed a motion for summary judgment, asserting that its receipt of tax exempt revenue bonds for its facilities expansion project was not a violation of the Establishment Clause, nor did it have the primary effect of advancing religion. [App. B, 87a]. Metro also moved for summary judgment. During oral argument on the motions, the trial court requested that the petitioners file a motion for summary judgment. [App. B, 87a]. Petitioners filed a motion for summary judgment, asserting that Lipscomb was so pervasively sectarian that a substantial portion of its function was subsumed in its religious mission and that the $15 million loan funded by tax revenue bonds had the impermissible effect of promoting religion as a matter of law.

On October 24, 2000, the trial court entered a memorandum and order granting petitioners' cross-motion for summary judgment and denying the respondents respective motions for summary judgment. *Steele v. Industrial Dev. Bd. of Metropolitan Government*, 117 F.Supp.2d 693 (M.D. Tenn. 2000). [App. B].

The trial court determined, based on the undisputed facts, that Lipscomb was a pervasively sectarian institution. The trial court's analysis of the facts which supports its conclusion is located in the record at App. B, 116a-129a. The trial court concluded that:

> The evidence presented in the depositions and literature of Lipscomb shows that, while Lipscomb may effectively teach a wide variety of secular courses, the central mission of the school is to inculcate and promote Churches of Christ doctrine as the true word of God. Students are taught entirely by Churches of Christ members; are informed of the importance of the Bible in all areas of their lives; are expected to attend Bible courses and chapel on a daily basis and surrounded by an environment thoroughly saturated by Churches of Christ doctrine. The school does not follow the Statement of Principles on Academic Freedom of the AAUP, and the section of the faculty handbook dealing with research states that the primary aim of every instructor should be to give superior academic instruction, emphasizing daily instruction in the Bible. Lipscomb's Board of Directors, which controls all major decisions of the school, contains only members of the Church of Christ. (*See also* App. B, Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 26(A) at 6) Christian education is one of the three principal duties of the president of the school.

> In this environment, the chance that religion "would seep into the teaching of secular subjects," as discussed in *Roemer*, 426 U.S. at 751, 96 S. Ct. at 2347, seems inevitable.

[App. B, 128a-129a]
(footnote omitted)

The trial court also determined that the low interest loan of $15 million originated by the Board at Lipscomb's request constituted a direct economic benefit because it advanced Lipscomb's sectarian mission. The lower court held that:

> The form of aid provided to Lipscomb was a substantial, affirmative benefit that, unlike property tax exemptions, allowed Lipscomb to dramatically improve its facilities. Lipscomb improved not only its academic facilities, but the recreational facilities that would make the school more attractive to potential students. Students may only take advantage of these benefits if they agree to abide by the Churches of Christ aspects of the institution. This is a far cry from receiving bus fare to transport a student to the institution of his or her choice.

[App. B, 133a-134a]

The trial court further determined that the expansion funded by the proceeds from the revenue bonds was a high priority for Lipscomb and was part of its strategic plan to increase its enrollment from 2,250 to 3,000 students. [App. B, 134a]. At the relevant time period, donations to Lipscomb were down ten percent (10%) and student enrollment had dropped eight percent (8%). [App. B, 134a]. The trial court concluded that:

> Unlike the cases in which textbooks, teachers or teaching materials were either loaned to schools or provided to the students, Lipscomb received a flow

> of funds into its coffers provided by a loan from the Board. These funds did not merely supplement the teaching of secular subjects at Lipscomb; they were central to the school's stated goal of increasing enrollment. If Lipscomb's mission is to promote Churches of Christ doctrine, then Metro, through the Board, provided aid to promote Churches of Christ doctrine.

[App. B, 134a-135a]

The trial court also issued a permanent injunction enjoining the Board and Metro from using any additional tax exempt revenue bonds for the benefit of Lipscomb or any other pervasively sectarian institution. The trial court awarded petitioners nominal damages in the amount of $1.00 each and awarded petitioners' attorneys' fees.

Respondents timely appealed. In an opinion with a vigorous dissent, the Court of Appeals reversed the trial court, and granted summary judgment to Lipscomb and Metro. *Steele v. Industrial Dev. Bd. of Metropolitan Government*, 301 F.3d 408 (6th Cir. 2002) [App. A]. The majority opinion of the Court of Appeals held that the pervasively sectarian status of Lipscomb was not a relevant consideration in its Establishment Clause analysis. [App. A, 29a]. The majority opinion further held that the $15 million low interest loan originated by the Board at Lipscomb's request was not direct aid and was analogous to an indirect financial benefit conferred by a religiously neutral tax or charitable deduction. [App. A, 29a].

Petitioners request the Court to grant a Writ of Certiorari in this matter and to address the important Establishment Clause issue presented in this case.

REASONS FOR GRANTING THE WRIT

I. The Decision Rendered by the Court of Appeals Conflicts with Controlling Decisions of this Court.

In *Tilton v. Richardson*, 403 U.S. 672 (1971), *Hunt v. McNair*, 413 U.S. 734 (1973) and *Roemer v. Board of Publ. Works of Maryland*, 426 U.S. 736 (1976), this Court established that a government may not provide financial aid to a pervasively sectarian institution. As the trial court noted, these cases involve financial assistance provided to colleges and universities by states in the form of grants or proceeds from revenue bonds. [App. B, 105a]. These cases are controlling because their facts parallel the facts in the case at bar.

In *Tilton*, this Court stated that the "crucial question" concerning government aid to religiously affiliated schools "is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." 403 U.S. at 679. This Court recognized the possibility that there could be cases in which "religion so permeates the secular education provided by church-related colleges and universities that their religious and secular education functions are in fact inseparable." *Id.* at 680. These "pervasively sectarian" institutions cannot receive governmental assistance without the impermissible effect of advancing the religious belief of those institutions. *See Roemer*, 426 U.S. at 755.

The majority opinion rendered by the Court of Appeals recognized that the Supreme Court decisions which established the "pervasively sectarian test" have not been overruled and that this Court has directed that lower courts are to treat its prior cases as controlling until this Court specifically overrules those cases [App. A, 13a-15a], yet it

refused to apply the "pervasively sectarian test" in this case. Instead, it held that "the nature of the institution is not the relevant inquiry in the special type of aid at issue in this appeal." [App. A, 29a].

In a nutshell, the lower appellate court held that the Establishment Clause was not violated in this case because it determined that the nature of the aid conferred by the tax exempt revenue bonds is not direct aid and the revenue bond program does not present the perception of government endorsement of religion. [App. A, 29a-30a]. In so ruling, the majority opinion emphasized that the funding, which was available on a neutral basis, did not involve the expenditure of government funds, that bond holders had no recourse against the Board or Metro in the event of non-payment and that the benefit obtained by Lipscomb is the same provided to private companies which create identical economic opportunities. [App. A, 29a-30a].

The majority opinion rendered by the Court of Appeals is erroneous because it failed to follow *Tilton v. Richardson*, *supra*, *Hunt v. McNair*, *supra*, and *Roemer v. Board of Publ. Works of Maryland*, *supra*, and failed to hold that local government cannot provide direct financial aid to a pervasively sectarian institution.

While respondents may quibble about whether Lipscomb is a pervasively sectarian institution, the trial court held, as a matter of law, based on undisputed facts that Lipscomb was a pervasively sectarian institution. [App. B, 115a-129a]. According to the trial court, in the environment presented at Lipscomb, it seems inevitable that religion "would seep into the teaching of secular subjects." [App. B, 129a]. The Court of Appeals did not disturb the trial court's determination that Lipscomb was a pervasively sectarian institution. [App. A, 29a]. The majority opinion deemed that this controlling fact "is not the relevant inquiry in the special

type of aid at issue in this appeal." [App. A, 29a]. The dissent noted that based on the undisputed facts in the record, the trial court held that as a matter of law Lipscomb "is a pervasively sectarian institution and that the loan transaction amounted to a direct economic benefit for Establishment Clause purposes." [App. A, 49a].

The majority opinion erred in holding that the low interest $15 million dollar loan originated by the Board at Lipscomb's request was an indirect economic benefit analogous to a religiously neutral tax or deduction. [App. A, 23a]. In so ruling, the majority opinion failed to understand the petitioners' argument, which is that although the Tennessee statute permitting the issuance of revenue bonds is not unconstitutional on its face, its application to provide a $15 million low interest loan to a pervasively sectarian institution violates the Establishment Clause.

In an Establishment Clause case, it is important to examine the manner in which a statute is applied to provide aid to specific groups. As Justice Blackmun, writing for the plurality, recognized in *Roemer*:

> The State must confine itself to secular objectives, and neither advance nor impede religious activity. Of course, that principle is more easily stated than applied. The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike. The Court also has taken the view that the State's efforts to perform a secular task, and at the same time avoid aiding in the performance of a religious one, may not lead it

> into such an intimate relationship with religious authority that it appears either to be sponsoring or to be excessively interfering with that authority.

426 U.S. at 747-48.

Thus, in evaluating the neutrality of a government aid program, the court must look at both the facial neutrality of the statute and the manner in which the statute is applied in providing aid to specific groups. *See Id., see also Bowen v. Kendrick*, 487 U.S. 589, 609-10, (1988) ("Of course, even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion.").

The revenue bond statute as applied to provide a $15 million low interest loan to a pervasively sectarian institution, Lipscomb, provided a direct financial benefit which had the principal or primary effect of advancing religion.

As the trial court noted, Lipscomb intentionally sought government financing for its building program rather than private financing. [App. B, 132a]. From the government, it received a low interest government loan. While the bond holders benefited from the tax exempt nature of the bonds, Lipscomb benefited as well. The trial court noted that "Lipscomb has repeatedly stated that it received a substantial benefit from the tax exempt bonds – some thirty percent (30%) of the cost of the project – and that it could not have completed the project if it had not been granted this benefit by the Board and Metro." [App. B, 133a].

As the trial court noted, improving the library facilities and student center were high priorities for Lipscomb in 1989-90. Such an expansion was part of Lipscomb's plan to increase enrollment from 2,250 to 3,000 students. [App. B,

133a-134a]. At the time, donations to Lipscomb were down ten percent (10%) and student enrollment had dropped eight percent (8%) [App. B, 134a]. Lipscomb saved an estimated thirty percent (30%) of the interest it would have cost to find alternative financing for the construction projects and cannot say what projects would have gone unfunded if it had not received the tax exempt bonds. [App. B, 134a]. With the tax exempt bonds, Lipscomb was able to fully fund its construction projects. The trial court determined that "Lipscomb received a flow of funds into its coffers provided by a loan from the Board. These funds did not merely supplement the teaching of secular subjects at Lipscomb; they were central to the school's stated goal of increasing enrollment. If Lipscomb's mission is to promote Churches of Christ doctrine, then Metro, through the Board, provided aid that had the impermissible effect of promoting Churches of Christ doctrine." [App. B, 134a-135a].

The trial court determined that this low interest $15 million loan was a direct benefit to Lipscomb, holding that since the *Hunt* decision, this Court has implicitly recognized the bond proceeds loan structure in that case as an example of direct state aid. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 842 (1995) (citing *Hunt* as one of the cases correctly cited by the Court of Appeals as establishing "the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions.") [App. B 137a].

As the Court of Appeals dissent noted, the benefit conferred by the government to Lipscomb was not a passive benefit but rather affirmative involvement similar to a general subsidiary. [App. A, 73a-74a]. In *Walz v. Tax Comm'n.*, 397 U.S. 664 (1970), Justice Brennan explained this distinction as follows:

> Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from the taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes.

397 U.S. at 690-691
(footnotes omitted)

Thus, in finding in *Walz* that the property exemptions in question did not rise to the level of excessive governmental involvement, Justice Brennan noted:

> To the extent that the exemptions further secular ends, they do not advance "essentially religious purposes." To the extent that purely religious activities are benefited by the exemptions, the benefit is passive. Government does not affirmatively foster these activities by exempting religious organizations from taxes, as it would were it to subsidize them. The exemption simply leaves untouched that which adherents of the organization bring into being and maintain.

Id. at 693

In the case at bar, as the dissent noted, although no state funds were transferred through revenue bond financing employed in this case, the form of state aid exhibits the "affirmative involvement characteristic of outright governmental subsidy." [App. A, 74a]. The Board and Metro "affirmatively fostered" the activities of Lipscomb by

acceding to its request for a low interest loan funded by tax exempt revenue bonds. The issuance of the low interest loan to the pervasively sectarian educational institution in this case "employs the organs of government for essentially religious purposes by allowing Lipscomb to fund improvements to its University in order to advance its sectarian mission. By providing a low interest loan funded by tax exempt revenue bonds to a pervasively sectarian educational institution, the Board and Metro provided the kind of state aid that is characteristic of a direct governmental subsidy. [App. A, 74a-75a].

Thus, the dissent concluded, given Lipscomb's pervasively sectarian character, it must be concluded that Lipscomb's receipt of a direct economic benefit in the form of a low interest $15 million loan resulted in excessive governmental entanglement with the religious mission of the University. In view of Lipscomb's character and purposes, its "secular activities cannot be separated from sectarian ones." *Roemer*, 426 U.S. at 755. Because the religious and secular functions are inseparable at Lipscomb, no safeguard can ensure that direct monetary aid, even if designated to fund the school's secular activities, will not aid its religious mission. [App. A, 75a]. Even though the loan agreement explicitly prohibits Lipscomb from using any bond-financed facilities for religious purposes, there is not way to prevent that from happening because of Lipscomb's pervasively religious character. Although the loan agreement does contain restrictive language providing that Lipscomb shall not use the project for religious worship, religious instruction or the training of ministers or other persons in the field of religion, the trial court noted that there is no enforcement mechanism in regard to these restrictions. The Board assigned its entire interest in the loan to Sovran Bank. Banks have no duty to comply with the Establishment Clause in their financial transactions. Thus, the trial court concluded

that "the government has abdicated any responsibility for enforcing the use restriction." [App. B, 154a].

Since the sectarian and secular activities at Lipscomb are so inextricably intertwined, the government cannot avoid excessive entanglement with the sectarian mission of the University. *See Agostini v. Felton*, 521 U.S. 203, 234 (1997).

Further, the trial court determined that based on the official statement released by the Board and Lipscomb in connection with the 1991 Bond Reissue, the perception of a reasonable observer would be that the Board and Metro were endorsing Lipscomb and its sectarian purpose and beliefs. [App. B, 164a-167a]. The official statement describes Lipscomb's religious mission and affiliation in significant detail. [App. B, 165a-166a]. The trial court determined that taken together, the official statement shows Lipscomb to be a strictly religious school whose primary mission is to teach the values and benefits of the Churches of Christ. [App. B, 166a]. Thus, the trial court found that "[t]he structure and content of the official statement indicates to the reasonable observer that the Board, as an instrumentality of Metro, is endorsing the sectarian beliefs and teachings of Lipscomb." [App. B, 167a]. Thus, under the endorsement of religion test, the low interest $15 million loan to Lipscomb also has the impermissible effect of advancing religion. *See County of Allegheny v. American Civil Liberty's Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989); *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985), *Lynch v. Donnelly*, 465 U.S. 668, 691-92 (1984) (O'Connor J. concurring).

It is important to note that the financial benefit of the $15 million dollar low interest loan was not conferred on Lipscomb by independent choices of private individuals. This Court has found that there is no government support of religion where government funds are provided to individuals

who then decide to use those funds in support of religious education. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8-10 (1993). The trial court determined that "[w]here the government funds are provided directly to the religious institutions without the intervening decisions of private individuals, government support is more likely to be found to have the effect of advancing religious purposes of the institution." [App. B, 147a]. *See also Agostini, supra* at 225-26; *Zelman v. Simmons-Harris*, 536 U.S. ___, 122 S. Ct. 2460 (2002).

In the case at bar, although the revenue bonds were marketed to private investors, the government, through the Board, *not* private investors, decided who would receive the benefit of the sale of the bonds. Thus, tax exempt revenue bonds are distinguishable from school vouchers. *Zelman v. Simmons-Harris, supra.* The private investors could not select which institution they wanted to receive the funds. The private investors merely chose to invest in tax exempt bonds. This is nothing like parents choosing to send their children to a parochial school. [App. B, 148a]. As Justice O'Connor has noted, "endorsement of the religious message is reasonably attributed to the individuals who select the path of the aid." *Mitchell v. Helms*, 530 U.S. 793, 843 (2000) (O'Connor, J., concurring in judgment). Since the government selected Lipscomb to receive the direct economic benefit of a $15 million low interest loan, an endorsement of that pervasively sectarian institution's religious purpose and message is "reasonably attributed" to Metro and the Board.

In short, the majority opinion of the Court of Appeals failed to apply controlling case law rendered by this Court to determine that the direct economic benefit conveyed by Metro, through its Board, to Lipscomb, a pervasively sectarian institution, violated the Establishment Clause.

II. The Court of Appeals Has Decided an Important Question of Federal Law that Has Not Been, but Should Be, Settled by this Court.

No other federal appellate court, including this Court, has addressed the issue of whether a local government's issuance of tax exempt revenue bonds to finance a low interest loan to a pervasively sectarian educational institution constitutes direct aid that violates the Establishment Clause. [App. A, 11a].

This is an issue of national importance that affects policies relating to the use of tax exempt revenue bond financing throughout the fifty states. The Court of Appeals noted, "The financing in question has been made available to colleges and universities in Metro, as well as throughout Tennessee and the United States." [App. A, 25a].

Numerous national organizations interested in the issue involved in this appeal intervened as *amicus curiae* in the Court of Appeals on both sides of this case. Two weeks before oral argument, the United States Department of Justice also intervened as an *amicus curiae* on the side of Lipscomb, arguing that the Court's decision would have a direct impact on the Bush Administration's proposed faith based charities programs.

The decisions of the District Court and the Court of Appeals have been widely reported in the national press. Their implications have been debated in both legal and religious publications.

The issue involved in this appeal is one of national importance, which should be decided by this Court.

CONCLUSION

Wherefore, since the Court of Appeals decision conflicts with controlling precedents and this appeal involves an issue of national importance, the Court is urged to grant the Petition for Writ of Certiorari, reverse the decision rendered by the Court of Appeals and reinstate the judgment of the District Court.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 00-6646/6647/6648/6649

HAROLD E. STEELE; DON PETERSON; Rev. DAVID MAYNARD; HARMON WRAY; Rev. TOM BAKER, JR.,
Plaintiffs-Appellees,

v.

INDUSTRIAL DEVELOPMENT BOARD OF METROPOLITAN GOVERNMENT NASHVILLE (00-6648); METROPOLITAN GOVERNMENT OF NASHVILLE (00-6646); DAVID LIPSCOMB UNIVERSITY (00-6647); NATIONSBANK (00-6649); NATIONSBANK/TENNESSEE (00-6649),
Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 91-00421
Aleta A. Trauger, District Judge.

Argued: February 1, 2002
Decided and Filed: August 14, 2002

Before: NORRIS and CLAY, Circuit Judges; SARGUS, District Judge.*

SARGUS, D. J., delivered the opinion of the court, in which NORRIS, J., joined. CLAY, J., delivered a separate dissenting opinion.

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* The Honorable Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

SARGUS, District Judge. Defendants have appealed the district court's order granting summary judgment to Plaintiffs and issuing a permanent injunction prohibiting the Industrial Development Board ("Board") and the Metropolitan Government ("Metro") from issuing additional tax-exempt bonds to David Lipscomb University ("Lipscomb University") or bonds to any other pervasively sectarian institution. (J.A. 1027-28). Metro and Lipscomb University also appeal the court's denial of their separate motions for summary judgment. For the reasons that follow, we REVERSE the district court's grant of summary judgment for plaintiffs and REVERSE the district court's denial of summary judgment as to Metro and Lipscomb University.

I. BACKGROUND

The background of this case is well set forth by the district court which described Lipscomb University and its redevelopment project as follows:

> David Lipscomb University, founded in 1891, describes itself as a "liberal arts university." It is located in Nashville, Tennessee, and has an enrollment of approximately 2,500 students. It is affiliated with the Churches of Christ, and its primary mission has been to integrate Christian faith and practice with the pursuit of academic excellence.
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> During the early 1990s, Lipscomb undertook a major redevelopment project on its campus. To finance the project, Lipscomb sought a $15 million, low-interest loan from the Industrial Development Board. The Industrial Development Board approved the loan and financed it by issuing tax-exempt industrial development bonds worth $15 million.

Steele v. Indus. Dev. Bd. of the Metro. Gov't of Nashville and Davidson County, 117 F. Supp.2d 693, 694 (M.D. Tenn. 2000).

The district court then described the bonds the Board issued to Lipscomb University as those "typical of industrial revenue bonds that are commonly issued for educational or industrial purposes." The Board issued the bonds pursuant to its authority under state law for the financing of projects for "[a]ny nonprofit educational institution in any manner related to or in furtherance of the educational purposes of such institution, including but not limited to classroom, laboratory, housing, administrative, physical education, and medical research and treatment facilities." Tenn. Code Ann.§7-53-101(11)(A)(vii) (1990 Supp.).

This case was filed in the district court on May 30, 1991, challenging the validity of the Board's action in issuing the tax-exempt revenue bonds for the benefit of Lipscomb University. The plaintiffs are state and local taxpayers residing in the Nashville area. They contend that the issuance of tax-exempt revenue bonds for Lipscomb University provides an impermissible benefit to a pervasively sectarian institution, thereby violating the Establishment Clause of the First Amendment to the United States Constitution. Such aid, they argue, has the impermissible effect of advancing religion because a substantial portion of Lipscomb University's functions are subsumed in its religious mission. The plaintiff's objected to the issuance of the bonds on this basis at public hearings and meetings of the Board on April 16, 1990, May 30, 1990, and January 22, 1991. The decision was made to issue the bonds, which is the basis of this case.

As to the ability of the plaintiffs to bring this suit, the district court explained that the plaintiffs were found to have standing to bring this suit as municipal taxpayers who have an interest in preventing their local government from subsidizing

religious institutions. The plaintiffs argued that tax dollars were being expended on behalf of a pervasively religious institution because the tax base of the state and local governments was reduced by the tax-exempt bonds. They asserted that, if tax-exempt bonds had not been issued, Lipscomb University would have financed all or part of the project through taxable bonds, which would have provided significant revenue for the city coffers.

The tax exempt bonds do not constitute an indebtedness of either the Board or the Metropolitan Government. Neither the Board nor the Metropolitan Government can be held liable to pay any portion of the principal or interest on the bonds or any costs incident to their issuance. TENN. CODE ANN. § 7-53-306 (1985). No state or local government tax revenues have been or will be spent as a result of the issuance of the bonds.

The district judge originally assigned to this case found that, even if no tax money is spent, taxpayer status is proper grounds for an Establishment Clause challenge to policies that affect the city's general revenue fund. Summary judgment was denied on those grounds and, on interlocutory appeal, the Sixth Circuit Court of Appeals upheld the district court's decision as to standing. *Steele v. Indus. Dev. Bd. of the Metro. Gov't of Nashville and Davidson County*, 39 F.3d 1182 (6th Cir.1994) (unpublished table decision), *cert. denied*, 515 U.S. 1121, 115 S.Ct. 2275, 132 L.Ed.2d 279 (1995).

With regard to the mechanics of the bonds at issue, the district court's decision again provides a thorough summary:

> Under 26 U.S.C. §103 [Internal Revenue Code], gross income does not include interest on any state or local bonds that are both private activity bonds and qualified under 26 U.S.C. § 141. *See* 26 U.S.C. §103(a)(b)(1) (1994). A private activity bond is

defined, in relevant part, under 26 U.S.C. § 141 as any bond that is part of an issue which meets the "private loan financing test." 26 U.S.C. § 141(a)(2) (1994). The "private loan financing test" is met where "the amount of the proceeds of the issue which are to be used (directly or indirectly) to make or finance loans ... to persons other than governmental units exceeds the lesser of (A) 5 percent of such proceeds, or (B) 5,000,000." 26 U.S.C. § 141(c)(1) (1994).

In order for the interest on the bonds to be exempt from federal taxation, the private activity bonds must also be qualified under 26 U.S.C. § 141(e) (1994). There are three criteria that a bond issuance must meet under this section. First, the bond must fall within one of the enumerated categories: "(A) an exempt facility bond, (B) a qualified mortgage bond, (C) a qualified veterans' mortgage bond, (D) a qualified small issue bond, (E) a qualified student loan bond, (F) a qualified redevelopment bond, or (G) a qualified 501(c)(3) bond." 26 U.S.C. § 141(e)(1) (1994). Second, the bond issue must meet the volume cap requirements of section 146. 26 U.S.C. § 141(e)(2) (1994); *see also* 26 U.S.C. § 146 (1994). Finally, the bond issue must meet the requirements of each applicable subsection of section 147. 26 U.S.C. § 141(e)(3) (1994). Under the public approval requirement of section 147(f), in order to be a qualified bond a private activity bond ***must be approved by both the governmental unit issuing the bond and the governmental unit that has jurisdiction over the area in which the facility receiving financing through the bond proceeds is located.*** *See* 26 U.S.C. § 147(f)(2)(A) (1994).

> A bond that meets each of these criteria will be designated as a qualified private activity bond under 26 U.S.C. § 103. *Where the bonds issued are qualified private activity bonds, the interest from the bonds will be exempt from federal taxation.* 26 U.S.C. § 103 (1994).

Steele, 117 F. Supp.2d at 698 (emphasis added).

In the instant case, the bonds were issued for the benefit of Lipscomb University, a private educational institution. The bonds were issued for the purpose of renovating facilities on Lipscomb University's campus. This meets the "private loan financing test" of section 141(c) because the entire amount of bond proceeds loaned to Lipscomb University exceeded the statutory minimum loan amount. Therefore, the bonds may be characterized as private activity bonds under 26 U.S.C. § 141(a) (1994). Further, the Loan Agreement between the Board and Lipscomb University specifically prohibits it from using any bond-financed facilities for religious purposes.[1] The bonds in question meet the technical requirements of 26 U.S.C. § 103.

For the bonds to be qualified as tax exempt, they must also meet the criteria under section 141(e). The bonds meet the first criteria for being a qualified private activity bond under section 141(e)(1) because the bonds are qualified 501(c)(3) bonds,

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[1] The Loan Agreement between Lipscomb University and the Board does contain a restrictive use provision. Section 5.3 on "Special Covenants" states:

> (s) The Borrower will not use the Project or any part thereof for sectarian instruction or as a place of religious worship or in connection with any part of the program of a school or department of divinity for any religious denomination or the training of ministers, priests, rabbis or other similar persons in the field of religion.

Steele, 117 F. Supp.2d at 727 citing Docket No. 13, attach. Ex. 12 at 18.

which is one of the enumerated categories of bond types under this section. *See* 26 U.S.C. § 141(e)(1) (1994). A qualified 501(c)(3) bond is defined in section 145(a) as a private activity bond where "all property which is to be provided by the net proceeds of the issue is to be owned by a 501(c)(3) organization." 26 U.S.C. § 145(a)(1) (1994). All of the proceeds of the $15,000,000 bond issue were loaned to Lipscomb University for use in building new facilities and in renovating existing facilities. Lipscomb University is a registered 501(c)(3) organization, thereby satisfying this requirement.

The district court summarized the final requirement as to pubic hearing and local approval as follows:

> [A] private activity bond will not be a qualified bond unless it meets the subsection's public approval requirement. 26 U.S.C. § 147(f) (1994). This requirement is satisfied where the bond issue has been both (1) approved either by or on behalf of the governmental unit that issued the bonds, and (2) approved by each governmental unit that has jurisdiction over the area where any facilities which are to be financed by the bond proceeds are located. 26 U.S.C. § 147(f)(A) (1994). In each case, the approval must be given by either "the applicable elected representative of such governmental unit after a public hearing following reasonable notice" or by a voter referendum of the governmental unit. 26 U.S.C. § 147(f)(B) (1994). The elected representative may be an elected legislative body of the governmental unit, "the chief elected executive officer, the chief elected State legal officer of the executive branch, or any other elected official of such unit designated for the purposes of this paragraph by such chief elected executive officer or

by State law." 26 U.S.C. § 147(f)(2)(E)(i) (1994). *Steele*, 117 F. Supp.2d at 698.[2]

In this case, the bond issue was approved by the Industrial Development Board as the governmental unit that issued the bonds and by Mayor Bill Boner as the chief elected executive officer of Metropolitan Government of Nashville and Davidson County, the governmental unit in which the facilities of Lipscomb University are located.

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[2] The "scope" of the governmental approval is addressed in federal regulations, which state:

> An issue is treated as approved if the governmental units ... have approved either - (i) The issue ... not more than one year before the date of issue, or (ii) A plan of financing for each facility financed by the issue pursuant to which the issue in question is timely issued (as required in paragraph (f)(3) of this section). In either case, the scope of the approval is determined by the information, as specified in paragraph (f)(2), contained in the notice of hearing ... and the approval. (2) Information required. A facility is within the scope of an approval if the notice of hearing . . . and the approval contain - (i) A general, functional description of the type and use of the facility to be financed . . . (ii) The maximum aggregate face amount of obligations to be issued with respect to the facility, (iii) The initial owner, operator, or manager of the facility, (iv) The prospective location of the facility by its street address or, if none, by a general description designed to inform readers of its specific location. ... An approval or notice of public hearing will not be considered to be adequate if any of the items in subdivisions (i) through (iv) of this subparagraph (2), with respect to the facility to be financed, are unknown on the date of the approval or the date of the public notice.

26 C.F.R.§ 5f.103-2(f) (1999).

II. STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *See Gribcheck v. Runyon*, 245 F.3d 547, 549 (6th Cir. 2001). The standards applicable to such review are well established:

> Summary judgment is appropriate where no genuine issue of material fact exists so that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court determines whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Of course, "inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motions." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The movant meets its initial burden "by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). At that point, the non-movant "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e): *Anderson*, 477 U.S. at 250, 106 S.Ct. 2505.

Clayton v. Meijer, Inc., 281 F.3d 605, 609 (6th Cir. 2002) (citation omitted).

III. ANALYSIS

The issue presented in this appeal is whether the issuance of tax exempt revenue bonds violates the Establishment Clause, if the bonds are for the benefit of an institution found by the district court to be pervasively sectarian.[3] The issue has not

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[3] In the following cases, the Supreme Court found government aid programs constitutional: *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality) (providing educational materials and equipment to religious schools upheld); *Agostini v. Felton*, 521 U.S. 203 (1997) (allowing remedial public school teachers and counselors to assist at religious school); *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (providing printing facilities for all qualified student publications including religious publication constitutional); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (providing a sign language interpreter for deaf child in religious secondary school not unconstitutional); *Bowen v. Kendrick*, 487 U.S. 589 (1988) (funding for abstinence-based family planning programs offered by religious social welfare agency found constitutional); *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986) (offering vocational education scholarship to visually disabled seminarian not unconstitutional); *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646 (1980) (reimbursing religious school for performing state-mandated standardized tests and record keeping); *Wolman v. Walter*, 433 U.S. 229 (1977) (providing textbook loans, vocational training, diagnostic services, therapeutic and remedial services, and standardized testing and scoring for religious school); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976) (subsidizing per-student to a religious college constitutional); *Tilton v. Richardson*, 403 U.S. 672 (1971) (finding construction grants to religiously affiliated college constitutional); *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968) (loaning of textbooks for religious school upheld); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (reimbursing parents for bus transportation costs to religious school constitutional); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930) (loaning textbooks to religious school constitutional); *Bradfield v. Roberts*, 175 U.S. 291 (1899) (allowing federal funds to build a Catholic hospital constitutional).

been addressed by other Circuits or by the Supreme Court.[4]

The First Amendment, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Supreme Court has consistently held that the Establishment Clause, prohibiting government establishment of religion, and the Free Exercise Clause, prohibiting government restrictions of the free exercise of religion, must function in harmony. *Johnson v. Economic Development Corp.*, 241 F.3d 501, 509 (6th Cir.

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[4] Several state courts have addressed the precise issue; all have found that the issuance of industrial revenue bonds is not tantamount to the giving of direct aid to religious schools. *Opinion of the Justices*, 354 Mass. 779, 236 N.E.2d 523, 526, 27 (1968) (concluding that tax-exempt bond financing is not a form of direct assistance to private or religious charitable institutions, as there was no grant or appropriation of public money, no loan of public credit, and the participants bore all costs of the program); *Vermont Educ. Bldgs. Financing Agency v. Mann*, 247 A.2d 68, 72 (Vt. 1968) *app. dism'd*, 396 U.S. 801 (1969) (same); *Nohrr v. Brevard County Educ. Facilities Auth.*, 247 So.2d 304, 307-09 (Fla. 1971) (same); *Cercle v. Ill. Educ. Facilities Auth.*, 288 N.E.2d 399, 401 (Ill. 1972) (same); *Calif. Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 515, 520 (Cal. 1974) (same); *Minn. Higher Educ. Facilities Auth. v. Hawk*, 232 N.W.2d 106, 111(Minn. 1975); *Washington Higher Educ. Facilities Auth. v. Gardner*, 699 P.2d 1240, 1243, 1245-46 (Wash. 1985) (holding that the tax exempt status did not create a debt or a borrower-lender relationship between the state and the religiously affiliated universities or the bondholders, the bond proceeds never entered the public treasury, repayment did not pass through the public treasury, and no state debt was created); *Cortez v. Independence County*, 698 S.W.2d 291, 292 (Ark. 1985) (concluding that the tax-exempt revenue bonds were not a pledge of public money); *Virginia College Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 698 (Va. 2000) (finding that the aid received from tax-exempt revenue bonds does not involve usage of governmental funds in the traditional sense in which the terms have been used). *See also Durham v. McLeod*, 192 S.E.2d 202, 203-04 (S.C. 1972), *app. dism'd for want of a sub'l fed'l question*, 413 U.S. 902 (1973) (finding that tax-free revenue bonds satisfied solely by student loan payment were neither a state debt nor public money or credit).

2001) citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947); *Walz v. Tax Comm'n*, 397 U.S. 664, 669-70 (1970).

A. Pervasively Sectarian Test

The district court concluded that Lipscomb University is a pervasively sectarian institution. The district court set forth the law governing this analysis as follows:

> The pervasively sectarian test is based on the line of cases beginning with *Tilton* [v. Richardson, 403 U.S. 672 (1971)], and extending through *Bowen v. Kendrick*, 487 U.S. 589 (1988). In *Hunt v. McNair*, the Court found that "aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." 413 U.S. 734, 743 (1973). Thus, the rule under the pervasively sectarian test, as stated in *Roemer v. Board of Publ. Works of Maryland*, 426 U.S. 736, 96 S. Ct. 2337, 49 L. Ed. 2d 179 (1976), is that "no state aid at all go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones . . . ." 426 U.S. at 755.

Steele, 117 F. Supp.2d at 707 (parallel citations omitted).

The district court made the following finding:

> The evidence presented in the depositions and literature of Lipscomb shows that, while Lipscomb may effectively teach a wide variety of secular courses, the central mission of the school is to inculcate and promote Churches of Christ doctrine as the true word of God. Students are taught entirely by

> Churches of Christ members; are informed of the importance of the Bible in all areas of their lives; are expected to attend Bible courses and chapel on a daily basis and surrounded by an environment thoroughly saturated by Churches of Christ doctrine. The school does not follow the Statement of Principles on Academic Freedom of the AAUP, and the section of the faculty handbook dealing with research states that the primary aim of every instructor should be to give superior academic instruction, emphasizing daily instruction in the Bible. Lipscomb's Board of Directors, which controls all major decisions of the school, contains only members of the Church of Christ. Christian education is one of the three principal duties of the president of the school. In this environment, the chance that religion "would seep into the teaching of secular subjects," as discussed in *Roemer*, 426 U.S. at 751, 96 S. Ct. at 2347, seems inevitable.

Id. at 715 (internal citations omitted). Accordingly, the district court found that Lipscomb University is a pervasively sectarian institution.

The vitality of the pervasively sectarian test is questionable in light of subsequent, more recent decisions from the Supreme Court. In *Mitchell v. Helms*, 530 U.S. 793 (2000), six of nine Justices rejected an Establishment Clause challenge to loans of educational materials directly to parochial schools. Justice Souter pointed out in his dissenting opinion that "[N]o one, indeed, disputes . . . that the Roman Catholic schools which made up the majority of the private schools participating, were pervasively sectarian . . . ." In his plurality opinion, Justice Thomas responded by stating that:

> [T]he dissent is correct that there was a period of time when this factor mattered, particularly if the pervasively sectarian school was a primary or secondary school. But that period is one that the Court should regret, and it is thankfully long past."

Id. at 826. Justice Thomas went on to note that the pervasively sectarian analysis, "born of bigotry, should be buried now." *Id.* at 829.

Yet, *Mitchell* is a plurality opinion. Thus, the district court, and this Court, are still bound by pre-*Mitchell* law with regard to the pervasively sectarian doctrine. As the district court correctly noted:

> It is well settled that in a plurality opinion, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Coe v. Bell*, 161 F.3d 320, 354 (6th Cir. 1998) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)); *see also, Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764, fn. 9 (1988); *Reese v. City of Columbus*, 71 F.3d 619, 625 (6th Cir. 1995). In *Mitchell*, there is no single part of any opinion that commands the support of a majority of the Court. As a result, the only binding precedent of *Mitchell* is the holding. *See* Igor Kirman, Note, *Standing Apart to be A Part: The Precendential Value of Supreme Court Concurring Opinions*, 95 Colum. L. Rev. 2083, 2084-85 (1995); Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 Cornell L. Rev. 593, 1596-98 (1992).

Steele, 117 F. Supp.2d at 706 (parallel citations omitted).

Further, the Supreme Court has specifically stated that the lower courts are to treat its prior cases as controlling until the Supreme Court itself specifically overrules them. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). In reaffirming its prior mandate the Court noted in *Agostini* that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id. citing Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). It is for the Supreme Court, not this Court, to jettison the pervasively sectarian test, which it has not done.

Regardless of whether the pervasively sectarian test is still the law, we conclude that, given the nature of the aid in question, the issue of the bonds does not offend the Establishment Clause.

B. Nature of the Institution Receiving the Aid

The precise type of aid at issue in this appeal is virtually identical to the bonding mechanisms involved in *Hunt v. McNair*, 413 U.S. 734 (1973). The Supreme Court described the program as follows:

> The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own

> property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit."

Hunt, 413 U.S. at 745 n7.

This passage would seem to indicate that a public body could serve as a conduit to allow a pervasively sectarian institution to receive the benefits of tax free bonds so long as public funds were not expended. Rather than reach such conclusion, however, the Supreme Court instead found that the schools at issue were not, in fact, pervasively sectarian and found it unnecessary to address the precise issue before this Court. Since *Hunt*, the Supreme Court has not addressed the issue.

More recently, in *Johnson v. Economic Development Corp.*, 241 F.3d 501 (6th Cir. 2001), this Court considered a case involving facts similar to *Hunt*, *supra*. In *Johnson*, a private Catholic school applied for and was granted an industrial revenue bond from the Michigan Economic Development Corporation, an agency of the State of Michigan. This Court held that the school, although a Roman Catholic institution, was not a pervasively sectarian institution. *Id.* at 515.

Because of this conclusion, the Court did not resolve the question of whether the granting of an industrial revenue bond to a pervasively sectarian institution is an unconstitutional form of aid. The *Johnson* Court did note, however, that:

> [I]t is far from settled that the type of aid at issue in this case is direct aid within the meaning of the Establishment Clause jurisdiction.

Id. at 510.

> Moreover, the Court also made the following observation:
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> Plaintiff claims that the tax-exemption under the EDC Act is the equivalent of a tax subsidy for purposes of the Establishment Clause. . . . The Supreme Court has expressly rejected the argument. "There is a constitutionally significant difference between subsidies and tax exemptions." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 590, & n.25 (citing Walz, 397 U.S. [664,] 690 [(1970)]). The difference between subsidies and tax exemptions is that in giving tax exemptions "the government does not transfer part of its revenue . . . but simply abstains from demanding the [entity] support the state." *Walz*, 397 U.S. at 675. Therefore, the benefit provided by the tax-exempt status of the bonds does not amount to a cash subsidy.

Id. at 511-12 (parallel citations omitted).

Judge Nelson, in a concurring opinion, was even more direct and concluded that conduit financing in the form of an industrial revenue bond does not offend the Establishment Clause, even if the benefitting institution is pervasively sectarian. *Id.* at 518-19. He concluded that the type of aid in question was no different than the indirect aid provided by property tax exemptions available to religious institutions and expressly approved by the Supreme Court in *Walz*, *infra*. *Id.* at 519.

In the case at bar, the Board provides pass-through or conduit financing services to a wide variety of nonreligious and religious nonprofit organizations. The Board has arranged tax exempt financing, for example, for a number of colleges and universities with and without a religious affiliation, as well as for low-income housing projects, the Country Music Hall of Fame, the Easter Seal Society, retirement centers, the Jewish Community Center, the Young Mens Christian Association, and Nashville Public Radio. (Cochran Aff. at 3-4; Pressnell Aff. at 2 & Ex. B). Further, similar conduit financing has been provided to a number of privately owned development projects.[5] Significantly, no claim is made that the Board ever favored or disfavored one religion over another.

C. Nature of the Aid

Lipscomb University contends that the bonds represent indirect aid of the type the Supreme Cout upheld in *Walz v. Tax Commission*, 397 U.S. 664 (1970). The *Walz* Court held that a statute which provided a tax exemption for real estate owned by religious organizations did not represent an unconstitutional governmental attempt to establish, sponsor, or support religion. In language pertinent to this appeal, the Supreme Court noted:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenues to churches but simply abstains from demanding that the church support the state.

Id. at 675. The Supreme Court concluded that "[t]here is no genuine nexus between tax exemption and establishment of religion." *Id.*

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[5] The Court notes that Congress has acted to limit the number of bonds issued by state and local government. The Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 214, 96 Stat. 324, 466-68 (codified at I.R.C. § 103(b)(6)).

Subsequently, the Court made clear that an indirect financial benefit conferred by a religiously neutral tax does not give rise to an Establishment Clause violation. In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld a tax deduction for amounts paid as school tuition, text books, and transportation.[6] The Court acknowledged that "religious institutions benefit very substantially from the allowance" of this kind of tax deduction. *Id.* at 396 n.5. The Court found that both parents and parochial schools received a benefit, and the assistance "ultimately has an economic effect comparable to that of aid given directly to the schools attended by the children." *Id.* at 399. Irrespective of this benefit, the Court acknowledged its decisions "consistently have recognized that traditionally '[legislatures] have especially broad latitude in creating classifications and distinctions in tax statutes,' *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 547 (1983), in part because the 'familiarity with local conditions' enjoyed by legislators especially enables them to 'achieve an equitable distribution of the tax burden.'" *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). *Id.* at 396. Thus, a religious school's receipt of indirect benefits through a tax deduction "does not

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[6] The Court found significant that these deductions were among many deductions allowed under Minnesota law. For example, the Court found that:

> Deductions for charitable contributions, allowed by Minnesota law, Minn. Stat. § 290.21, subd. 3 (1982), include contributions to religious institutions, and exemptions from property tax for property used for charitable purposes under Minnesota law include property used for wholly religious purposes, § 272.02. In each case, it may be that religious institutions benefit very substantially from the allowance of such deductions. The Court's holding in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), indicates, however, that this does not require the conclusion that such provisions of a State's tax law violate the Establishment Clause.

Mueller, 463 U.S. at 396 and n.5.

require the conclusion that such provisions of a state's tax law violate the Establishment Clause." *Id.* at 396. As long as the tax benefit is neutrally available,[7] the Establishment Clause is not violated.

The only evidence of record is that similar bonds have been issued to both religious and non-religious institutions in a neutral manner. The financing in question has been made available to colleges and universities in Metro, as well as throughout Tennessee and the United States, and has been provided to a number of colleges and universities with different kinds of religious affiliations, and those without any religious affiliation.

In *Mueller*, the Supreme Court distinguished its holding in *Nyquist v. Committee for Public Education and Religious Liberty*, 413 U.S. 756 (1973). In *Nyquist*, the state legislation at issue included a wide range of government financial assistance in aid of private, predominately parochial education. State money was directed for maintenance and repair of private schools. In addition, the legislation provided for both direct tuition grants and tax credits payable to parents whose children attended private schools. In *Mueller*, the Court noted that the outright grants in *Nyquist* were fundamentally different from tax deductions given to all parents of public and private school students for education related expenses. 463 U.S. at 396 n.6.

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[7] The *Mueller* court found that "[M]ost importantly, the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools." The Court analogized to *Widmar v. Vincent*, 454 U.S. 263, 274 (1981), where it "concluded that the State's provision of a forum neutrally 'available to a broad class of nonreligious as well as religious speakers' does not 'confer any imprimatur of state approval,'" The Court concluded that "here: '[the] provision of benefits to so broad a spectrum of groups is an important index of secular effect.'" *Meuller*, 463 U.S. at n.7.

We address the neutrality issue *infra*.

Further, unlike the deductions approved in *Mueller*, the deductions at issue in *Nyquist* were not based on actual expenses incurred. Instead, the deductible amounts were estimated and designed to equal the dollar amount of the direct aid in the form of tuition grants available only to low income families. *Id.* The Court concluded that these grants did not take the form of ordinary tax benefits and constituted direct aid to religious schools.

In *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 688 (1989), the Court held provisions of the Internal Revenue Code permitting federal taxpayers to deduct gifts or contributions made to a variety of charitable organizations, including purely religious groups did not violate the Establishment Clause. In *Hernandez*, members of the Church of Scientology contended that the First Amendment prevented the IRS from deeming obligatory payments for attendance of "auditing sessions" as something other than a charitable contribution. *Id.* at 680. The IRS contended that a mandatory payment to the church for auditing and training was not a gift, but rather a *quid pro quo* payment for services received and therefore not deductable. The Church of Scientology contended that the disallowance of such payments as charitable deductions violated the Establishment Clause, *inter alia*, by creating excessive entanglement between church and state. The Supreme Court found no excessive entanglement and, in language pertinent to the issue before this Court, stated that "routine regulatory interaction which involves no inquiries into religious doctrine . . . no delegation of state power to a religious body . . . and no 'detailed monitoring and close administrative contact' between secular and religious bodies . . . does not of itself violate the nonentanglement command." *Id.* at 696-97 (internal citations omitted).

Most recently, in *Zelman v. Simmons-Harris*, 536 U.S. at ___ (2002), the Supreme Court again distinguished its holding

in *Nyquist*. The *Zelman* Court found that the school voucher program in Ohio did not violate the Establishment Clause. The Court found that the program was controlled by its holdings in *Mueller*, *Witters*, and *Zobrest*. As to *Nyquist* the Court held:

> To the extent the scope of *Nyquist* has remained an open question in light of these later decisions, we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion.

Zobrest, 536 U.S. at ___.

In a concurring opinion in *Zelman*, Justice O'Connor explained that a government program is not constitutionally infirm solely because a sustantial benefit is conferred on a religious organization. 536 U.S. at ___ (O'Connor, J. concurrence). She explained:

> Although $8.2 million is no small sum, it pales in comparison to the amount of funds that federal, state, and local governments already provide religious institutions. Religious organizations may qualify for exemptions from the federal corporate income tax, see 26 U.S.C. § 501(c)(3); the corporate income tax in many States, *see*, *e.g.*, Cal. Rev. & Tax.Code Ann. § 23701d (West 1992); and property taxes in all 50 States, see K. Turner, Property Tax Exemptions for Nonprofits, 12-Oct. Probate and Property 25 (1998); and clergy qualify for a federal tax break on income used for housing expenses, 26 U.S.C. § 1402(a)(8). In addition, the Federal Government provides individuals, corporations, trusts, and estates a tax deduction for charitable contributions to qualified religious groups. See §§ 170, 642(c). Finally, the Federal Government and certain state governments

> provide tax credits for educational expenses, many of which are spent on education at religious schools. *See, e.g.*,§ 25A (Hope tax credit); Minn.Stat. § 290.0674 (Supp.2001).
>
> Most of these tax policies are well established, *see, e.g., Mueller v. Allen*, 463 U.S. 388 (1983) (upholding Minnesota tax deduction for educational expenses); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970) (upholding an exemption for religious organizations from New York property tax), yet confer a significant relative benefit on religious institutions. The state property tax exemptions for religious institutions alone amount to very large sums annually.

Id. (parallel citations omitted).

Similar to the benefits at issue in *Walz*, *Mueller*, *Hernandez*, and now, *Zelman*, the bonds at issue in this case are analogous to an indirect financial benefit conferred by a religiously neutral tax or deduction.

D. Method by Which the Aid is Issued

The method by which the tax exempt bonds are to be issued to Lipscomb University is significant. Any institution seeking a tax exempt bond must arrange the financing by locating exclusively private lenders of the funds. The purchaser of a bond has recourse for repayment against Lipscomb University only; the holder of a bond has no recourse against the Board or Metro in the event of non-payment. No government funds are involved in the entire transaction. The interest paid to the bond holders by Lipscomb University is not subject to federal, state or local income taxes. Since the bonds are tax exempt, Lipscomb University reaps the benefit of a lower interest rate than that paid to a lender paying income

taxes on the interest received. Only by the potential loss of tax revenue does the conduit financing involve any impact on public funds.

Initially, we note that a governmental body must issue the bonds. While at first blush such fact would indicate governmental endorsement of religion, the reason for the issuance of the bonds by a governmental agency stems from the simple fact that the Internal Revenue Code excludes from income taxation only interest paid on industrial revenue bonds issued and approved by a state or local governmental unit. 28 U.S.C. § 147(f)(2)(A). Such qualifying bonds need not finance a governmental function (such as water or sewer lines), but may be issued to promote a variety of purposes, including economic development and higher education. Further, Tennessee law requires such bonds serve the "furtherance of the educational purposes of such institution, including but not limited to classroom, laboratory, housing, administrative, physical education, and medical research and treatment facilities." Tenn. Code Ann. §§ 7-53-101(11)(A)(vii).

The federal government has continuously provided an exemption for interest on bonds issued "by or on behalf of" states and localities since the inception of a federal income tax in 1913. Tariff Act of 1913, Pub. L. No. 63-16, ch. 16, 38 Stat. 114. Although states and localities first took advantage of this exception by issuing general obligation bonds, they later issued revenue bonds to help finance private business activities for the ostensible purpose of promoting economic growth. Stuart C. Johnson, *Multi-Family Housing Bonds: Can the Tax Code Provide an Efficient and Effective Low-Income Housing Program*, 5 Va. Tax. Rev. 497, 498-99 (1986) (citations omitted). Congress provided for an exemption from income taxation for industrial revenue bonds issued in connection with a project intended to benefit a local economy. The Internal Revenue Service explicitly legitimized this practice in 1954.

Rev. Rul. 54-106, 1954-1 C.B. 28, 28-29.[8] Such bonds have been typically issued by a governmental authority, even though such authority does not actually borrow the funds nor is such authority liable for repayment. "A revenue bond is repaid solely from the revenues generated by the facilities constructed with bond proceeds. In the issuance of this type of bond, the political subdivision acts solely as a conduit for issuing the bonds. It has no obligation to use its tax revenues to finance any shortfall." Zimmerman, *Limiting the Growth of Tax-Exempt Industrial Development Bonds: An Economic Evaluations* (1984) (Cong. Research Serv. Rep. No. 84-37E).

In addition, by requiring local governmental authorities to issue tax-exempt industrial revenue bonds, Congress delegated to such governmental units an element of control over local economic development. The revenue bonds serve as a means of financing local preferences. *See* Clayton P. Gillette, *Fiscal Federalism and the Use of Municipal Bond Proceeds*, 58 N.Y.U.L. Rev. 1030 (1983) (discussing Section 103 of the Internal Revenue Code, which provides a federal tax exemption for interest earned on state and municipal bonds).[9] For

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[8] The Service classified as tax exempt those bonds issued by a municipality to finance construction of privately used industrial plants, "notwithstanding the purpose for which they were issued or the fact that the promise to pay is limited to the revenue to be derived from leasing the property to be acquired. . . . It is not necessary . . . that the obligation be a general one, pledging the general credit of the municipality or the use of its taxing power."

[9] According to the Senate Committee on Finance, S. Rep. No. 494, 97th Cong., 2d Sess. 168 (1982), the public notice and approval requirements were enacted to help eliminate inappropriate uses of tax-exempt financing and to help restore the benefit of tax-exempt financing for traditional governmental purposes. While acknowledging that state and local governments are best suited to determine the appropriate uses of industrial developments bonds, the committee concluded that industrial development bonds serve a legitimate purposes only if (a) the affected

example, a local government might conclude that the issuance of an industrial revenue bond to a new business could give a competitive disadvantage to an existing business which had not received such conduit financing and result in economic displacement, rather than development.

It is clear from the record that industrial revenue bonds are issued to a wide variety of businesses, schools, universities, charities and other organizations. It is without question that a religious organization may receive "general government benefits" consistent with the Establishment Clause. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). As the Supreme Court noted in *Widmer v. Vincent*, 454 U.S. 263, 274, 275 (1981), "If the Establishment Clause barred the extension of general benefits to religious groups 'a church could not be protected by the police and fire departments or have its public sidewalk kept in repair'." *citing Roemer v. Bd. of Pub. Works.*, 426 U.S. 736, 747 (1976). We conclude that the issuance of tax exempt bonds on a neutral basis is the conference of a generally available governmental benefit.

E. Primary Purpose and Effect of the Program

In her concurrence in *Zelman*, Justice O'Connor reaffirmed that the modified *Lemon Test* is still a central tool in analysis of Establishment Clause cases noting:

> As originally formulated, a statute passed this test only if it had "a secular legislative purpose," if its "principal or primary effect" was one that "neither

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public has an opportunity to comment on the use of tax-exempt financing for particular facilities and (b) after that input, the elected representatives of the governmental unit determine that there will be substantial public benefit from issuing the bonds. H.R. Conf. Rep. No. 760, 97th Cong., 2d Sess. 518 (1982), 1982-2 C.B. 623-24. Based on this legislative history, Metro has clearly fulfilled its obligation under 147 (f) to approve a bond issue that meets the public criteria.

> advance[d] nor inhibit[ed] religion," and if it did "not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) (internal quotation marks omitted). In *Agostini v. Felton*, 521 U.S. 203, 218, 232-233 (1997), we folded the entanglement inquiry into the primary effect inquiry. This made sense because both inquiries rely on the same evidence, *see ibid.*, and the degree of entanglement has implications for whether a statute advances or inhibits religion, *see Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'CONNOR, J., concurring). The test today is basically the same as that set forth in *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 222 (1963) (*citing Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)), over 40 years ago.

Zelman, 536 U.S. ___ (2002) (O'Connor, J. concurring opinion) (parallel citations omitted).

As to the primary purpose, industrial revenue bonds advance a clear governmental, secular interest in promoting economic and educational development. Such conduit financing also promotes economic development though the underwriting of job-producing construction projects at colleges and universities. In turn, a more educated populace is better positioned to generate new development and economic opportunity. In a case involving industrial revenue bonds for a private religious high school, this Court held in *Johnson v. Economic Development Corp.*, 241 F.3d at 512:

> A state's decision to assist businesses in their operation in order to create and maintain jobs - regardless of the type of businesses - 'evidences a purpose that is both secular and understandable',

> *Mueller*, 463 U.S. at 395. . . Michigan could conclude that there is a strong public interest in promoting, assisting, and retaining commercial enterprises, both sectarian and non-sectarian.

As to the program's primary effect, tax free revenue bonds have neither the effect of advancing or inhibiting religion, or as Justice O'Connor has "put it, of 'endors[ing] or disapprov[ing] . . . religion.'" *Zelman*, 536 U.S. at ___ (O'Connor, J. concurrence) *citing Lynch v. Donnelly*, 465 U.S. at 691-92 (concurring opinion). Metro's program, "as in *Mueller*, '[ ] is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted.'" *Zelman*, 536 U.S. at ___ *citing Mueller*, 474 U.S. at 487.

The effect of Metro's program is economic and educational development. Many states and local governments have used industrial revenue bonds to entice new, or expanded manufacturing, commercial, and educational projects. These projects, privately owned, are not financed with direct government funding, but are given preferential tax treatment through conduit financing. Lipscomb University seeks the same type of financing for the expansion of its facilities as could be sought by Walmart, Sears, or educational institutions. The Loan Agreement between the Board and Lipscomb University specifically prohibits it from using any bond-financed facilities for religious purposes. The projects Lipscomb University seeks to finance would provide no less economic development than a new store or a new manufacturing facility.

Further, as in the school funding program the Supreme Court upheld in *Zelman*, Metro's industrial revenue bond program does not present the perception of endorsement to the reasonable observer. "'[T]he reasonable observer in the endorsement inquiry must be deemed aware' of the 'history and

context' underlying a challenged program." *Zelman*, 536 U.S. at ___ *citing Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001). As the *Zelman* Court stated:

> Any objective observer familiar with the full history and context of the Ohio program would reasonablely view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.

Zelman, 536 U.S. at ___.

Similarly, in the instant case, the objective observer of Metro's industrial revenue bond program, knowing the history and context of this program, would reasonably view it as one aspect of a broader undertaking to finance economic development, not as an endorsement of religious schooling in general. Metro no more endorsed Lipscomb University than it did Wal-Mart in issuing industrial revenue bonds.

IV. CONCLUSION

Because the proposed issuance of industrial revenue bonds to Lipscomb University is part of a neutral program to benefit education, including that provided by sectarian institutions, and confers at best only an indirect benefit to the school, we hold that the issuance of the bonds does not violate the First Amendment.

In sum, the nature of the institution is not the relevant inquiry in the special type of aid at issue in this appeal. The nature of the aid conferred by the tax free revenue bonds is not direct aid. Instead, it is analogous to an indirect financial benefit conferred by a religiously neutral tax or charitable deduction and is indistinguishable from that expressly approved in *Walz, supra*. The funding vehicle is available on a neutral basis. No government funds will be expended. Nor does any holder of a bond have recourse against the Board or Metro in

the event of non-payment. The benefit to be obtained by Lipscomb University is the same provided to private companies which create identical economic opportunities. The conduit financing advances a clear governmental, secular interest in promoting economic opportunity. Finally, the revenue bond program does not present the perception of government endorsement of religion.

Based on the foregoing, we **REVERSE** the district court grant of summary judgment for plaintiffs and **REVERSE** both the district court's denial of summary judgment for Metro and its denial of summary judgment to Lipscomb University.

DISSENT

CLAY, Circuit Judge, dissenting. Because David Lipscomb University ("Lipscomb") is indisputably a "pervasively sectarian" educational institution and because the low-interest loan to Lipscomb through the issuance of the tax-exempt bonds by the Industrial Development Board ("the Board") amounted to a direct economic benefit in violation of the Establishment Clause of the First Amendment of the U.S. Constitution, I would find that the district court did not err in granting Plaintiffs' cross-motion for summary judgment, denying the separate motions for summary judgment filed by the Board and the Metropolitan Government ("Metro") and entering a permanent injunction prohibiting the Board and Metro from issuing additional tax-exempt bonds to Lipscomb or tax-exempt bonds to any pervasively sectarian institution.

As will be conclusively demonstrated below, Lipscomb fits the profile of a pervasively sectarian educational institution by imposing religious restrictions on student admissions and faculty and staff appointments; enforcing obedience to its religious dogma, which is the "supreme purpose" of the University; requiring daily Bible study and attendance at chapel as an integral part of its religious mission; and placing religious limitations on how and what the faculty teach. The low-interest loan of $15 million originated by the Board at Lipscomb's request constituted a direct economic benefit because it enabled Lipscomb to advance its sectarian mission by funding improvements to the University. Given its pervasively sectarian character, the direct economic benefit to Lipscomb results in excessive governmental entanglement with the religious mission of the University in violation of the Establishment Clause.

BACKGROUND

Before addressing the substantive issues, it is helpful to describe in detail the nature of Lipscomb, a private, not-for-profit religious corporation affiliated with the Churches of Christ, which was founded by David Lipscomb and James Harding in 1891 and originally incorporated under the name of "The Nashville Bible School."[1] Characterizing itself as a "small co-educational liberal arts university" with an enrollment of approximately 2,500 students, Lipscomb states that "its primary mission has been to integrate Christian faith and practice with academic excellence." Among the objectives of Lipscomb are "[t]o provide the very best in a Christian liberal arts education under the direction of Christian teachers in a distinctly Christian environment . . . [t]o train future leaders in the church . . . [and] . . . [t]o hold up Christ as the example to follow in every field of activity." (J.A. at 38, 1249.)

According to Lipscomb's corporate charter and the bylaws of the Board of Directors,

> The corporation was organized for the purpose of teaching the word of God and the various branches of the useful knowledge, commonly taught in institutions of learning for the following general purposes: the support of any literary or scientific undertaking, as a college or university with power to confer degrees, an academy, a debating society lyceum, the establishment of a library, the support of a historical society, the promotion of painting, music and the fine arts, the

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[1] This portrayal of Lipscomb is largely based upon its own publications that date from the time that the Board approved Lipscomb's request for a loan financed by the issuance of $15 million in tax-exempt bonds. It should be noted that for the purposes of deciding the issue on appeal, there is nothing in the record to suggest that the current publications of Lipscomb are materially different in any relevant respect.

> support of Board of Trade or Chamber of Commerce or other objects of like nature, the support of public worship, the building of churches and chapels and the maintenance of missionary undertakings.

(J.A. at 805, 829-30). To this end, the bylaws of Lipscomb state that "[t]he President, with the assistance of vice presidents and principals, shall maintain a Christian college that shall perpetuate the high Christian ideals inaugurated by Harding and Lipscomb, the founders of David Lipscomb College, in which the Bible is made the book of most importance." (J.A. at 830-31.)

As noted in the President's letter in the 1989-1990 edition of the Student Handbook: "[W]e have a sincere interest in the spiritual values of each student and faculty staff member. Lipscomb has been built on Christian ideas. Daily Bible study and chapel provide direction but only you can make the commitment to grow closer to God." (J.A. at 293.) Lipscomb's Faculty Handbook also provides:

> The mission of David Lipscomb University is to serve its students so that they may master knowledge and skills appropriate to them and become Christlike in attitude and behavior.
>
> It must be kept firmly in the consciousness of all connected with the institution - administration, faculty, students, and patrons - that Lipscomb is a *Christian school.* In the original appeal for support, written by David Lipscomb, it was made clear that the Bible was to be the foundation upon which all else would center:
>
> > The supreme purpose of the school shall be to teach the Bible as the revealed will of God to man and as the only and sufficient rule of

> faith and practice, and to train those who will attend in a pure Bible Christianity, excluding from the faith all opinions and philosophies of men, and from the work and worship of the church of God all human inventions and devices. Such other branches of learning may be added as will aid in the understanding and teaching of the Scriptures and as will promote usefulness and good citizenship among men.

(J.A. at 1627.) (emphasis in original.) The Faculty Handbook continues by stating,

> This purpose was further set forth in the deed conveying the property on Spruce Street for the use of the school as follows:
>
> > . . . that the property shall be used for maintaining a school in which, in addition to other branches of learning, the Bible as the recorded will of God and the only standard of faith and practice in religion, excluding all human systems and opinions and all innovations, inventions, and devices of men from the service and worship of God, shall be taught as a regular daily study to all who shall attend said school and for no other purpose inconsistent with this object. The condition being herein inserted at the request of the founders of the proposed Bible School, the same is hereby declared fundamental and shall adhere to the premises conveyed as an imperative restriction upon their use so long as the same shall be owned by said Bible School, or its Trustees, and to any and all property which may be purchased with the proceeds of said premises in case of sale or reinvestment, as hereinafter provided.

> David Lipscomb University is not, therefore, merely an institution which requires every student to take a lesson in the Bible each day; this study is the wellspring from which the university issued.

(J.A. at 1627-28.)

These ideas about the central importance of the Bible are echoed throughout Lipscomb's catalogues. For example, in the university catalogue for 1988-1989, Lipscomb states:

> The Bible has always been considered the most important area of study for all students at DLC [David Lipscomb College]. The founders and those who have followed them have held it to be important that every student study the Bible in a class every day. Whatever one's major interest or life work, a thorough knowledge of the biblical life principles is needed.
>
> In daily classes the Bible is taught as the inspired word of God. With the Bible itself as the text, students are encouraged to apply the Bible principles of right living to all aspects of personal and professional life.
>
> In view of the daily Bible classes, it can be said that every Lipscomb graduate unofficially "majors in Bible." Those who formally major in Bible may give special emphasis in one of the following areas: Biblical Languages, Missions, Preaching, Religious Education, or Youth Ministry.

(J.A. at 41-42.) These points are reinforced in the 1990-1991 university catalogue:

> **The Daily Bible Requirement**
>
> The supreme purpose of David Lipscomb University is "to teach the Bible as the revealed will

> of God to man and as the only and sufficient rule of faith and practice, and to train those who will attend in a pure Bible Christianity." To help fulfill this purpose, each regular student must be enrolled in a Bible class each school day and also attend daily chapel services.
>
> Every college or university has a right and even an obligation to be unique and distinctive based upon its individual purpose. Few, if any, other colleges today require students to take regular daily classes in Bible study. Students who choose to attend David Lipscomb University should be interested and supportive of the daily Bible requirement. The university has no authority to suspend this requirement for any student.

(J.A. at 1253.) Lipscomb's 1990-91 catalogue further provides:

> Although the daily Bible requirement is important enough to be listed as a separate part of each student's academic program, it is also considered an integral part of the general education program at David Lipscomb College. No body of knowledge or study of any kind is as important as the study of the Bible itself.

(J.A. at 41, 1254.)

Accordingly, taking and passing a daily Bible class is a "fundamental requirement for attendance" at Lipscomb. (J.A. at 39-40.) As set forth in Lipscomb's student bulletin for 1991-92:

> The Bible has always been considered the most important area of study for all students at David Lipscomb University. The founders, and those who have followed them, have held it to be important that

> every student study the Bible. Whatever their major interest or life work, a thorough knowledge of Biblical principles is needed.
>
> In daily classes, Bible is taught as the inspired word of God. Students are encouraged to apply the Bible principles of right living to all aspects of personal and professional life.

(J.A. at 836-37, 1260.) These ideas were continually expressed in the editions of the Student Handbook from 1988 through 1992:

> Because the Bible is the heart of Lipscomb's curriculum, every regular student studies the Bible every school day. Offerings in the Department of Bible are arranged so that a student can, in four years, have exposure to the entire Bible.
>
> Any student who fails Bible is automatically placed on probation for the succeeding semester. Probation must be removed by passing each Bible course carried during the semester of probation. Failure to meet this requirement means that the student will be dropped at the end of the semester.

(J.A. at 303, 1189, 1212, 1235.) As explained by Dr. Joe Mac Lynn, the head of Lipscomb's Bible Department, each student is required to have two credit hours of Bible each semester in order to graduate from Lipscomb. (J.A. at 1504-5.) From 1988 until September 1992, approximately 100 undergraduate students were on "Bible probation." (J.A. at 834.) As noted in the Student Handbooks, students who do not pass every Bible course carried while on probation are subject to dismissal from the school.

In addition to daily Bible study, Lipscomb also requires every full-time student to attend chapel each school day. (J.A. at 833.) As stated in Lipscomb's Faculty Handbook:

> *Chapel*
>
> The heart of each day's activities at David Lipscomb University is the chapel service. It is here that the entire Lipscomb family gains strength and inspiration for the tasks of the day. *Since attendance at chapel is compulsory for all students, it is expected that each faculty member will attend chapel regularly.* No arrangements should be made which require regular chapel absences of one or more times each week without prior written approval of the dean.

(J.A. at 1401.) (emphasis in original.) As set forth in the editions of the Student Handbook from 1988 through 1992, a student with eleven absences from chapel during a semester is placed on "chapel probation." (J.A. at 303, 1189-90, 1212-13, 1235-36.) From 1990 through 1992, an average of 40 to 60 students were on "chapel probation" each semester. (J.A. at 833, 1463.) The Student Handbooks also provide that "[i]f flagrant disregard for chapel attendance persists, a student is subject to immediate suspension." (J.A. at 304.) In his deposition, Dr. Dennis Loyd, the Dean of Students at Lipscomb, testified that every full-time student "knows he goes to chapel," and that failure to do so results in dismissal. (J.A. at 1455-59.)

As stated in the bylaws of the Board of Directors, each director at Lipscomb must be a member of the Churches of Christ in good standing in the congregation. (J.A. at 110.) The Board of Directors elects the president to be its chief executive officer in charge of "its business and Christian education affairs." (J.A. at 115.) The bylaws also provide that "great care should be exercised in the selection and development of [ ]

teaching personnel." (J.A. at 116.) Moreover, all personnel, with the exception of employees of its services, building and grounds departments, shall be members in good standing of the Churches of Christ. (J.A. at 832.) Lipscomb also reserves the right under Title VII of the Civil Rights Act of 1964 (as amended) to discriminate, "where it is necessitated by the specific religious tenets held by the institution." (J.A. at 834, 1250.)

In addition, Lipscomb President Harold Hazelip acknowledged in his deposition testimony that all of its faculty must be members in good standing of the Churches of Christ, and that leaving the church is grounds for termination of employment. (J.A. at 1167, 1169.) In a letter to Nashville Mayor Boner opposing the bond issue, Norman Parks, the former dean of Lipscomb, remarked:

> No person can be employed at Lipscomb who is not a member of the mainline Church of Christ. He cannot be a premillennialist or believe that instrumental music is acceptable for worship of God. He must believe that a divorced person cannot remarry and continue in church. He must believe that a woman cannot teach a class in religion to men.

(J.A. at 1142.) In this regard, Dr. Lynn, the head of Lipscomb's Bible Department, testified in his deposition that a divorced teacher may be allowed to remain as a teacher at the university, but "[a] person who divorces and remarries during the [ ] employment relationship to [sic] the University would be subject to discipline or to dismissal." (J.A. at 1539.) According to Dr. Susan Dennison Sinclair, she was informed by the department chairman when she was hired as an adjunct professor in the English Department for one semester in 1990 that "he would not be allowed to recommend me based on various personal questions, one of them being the fact that my

husband and I at that time were separated." (J.A. at 1572.) Dr. Sinclair also testified that the chairman of the English Department informed her when she was hired that "there might be some problems, with the requirements of the university" by her failure to answer the question on the employment application concerning drinking. (J.A. at 566-67.)

Lipscomb also imposes religious restrictions on how and what the faculty teach. Specifically, Lipscomb admits that it does not subscribe to the American Association of University Professors' ("AAUP") Statement of Principles on Academic Freedom.[2] In contrast, Lipscomb's Faculty Handbook states:

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[2] The AAUP's principles provide:

a. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

b. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

c. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

(J.A. at 689.)

> In the final analysis, the worth of any educational institution is determined by its faculty. It is of special importance in the Christian university that every teacher be first dedicated to Christ and His truth, demonstrating those qualities of heart and life which will inspire young people to love the Lord and strive to please Him. This devotion must be accompanied by sound scholarship, awareness of student needs, and a determined desire to serve.

(J.A. at 1305.) Under the subheading of "Academic Freedom," the Faculty Handbook adds:

> Each member of the Lipscomb faculty is committed both by personal conviction and by contract to the purposes and ideals of the institution as set forth by the founders and Board of Directors. Within this framework each teacher is free to pursue and teach truth in his/her respective field of learning. Since truth is consistent everywhere, this basic commitment makes possible academic freedom without the necessity of a formal statement.

(J.A. at 1305.) According to Dr. Sinclair, who has had a long association with Lipscomb in addition to teaching there, the administration at Lipscomb directed members of the faculty to teach certain religious doctrines or views in courses given in the Biology and Physics Departments, where faculty members are "instructed to teach creationism." (J.A. at 1616-17.) In her affidavit, Dr. Sinclair also stated:

> 5. Those who are not familiar with the church of Christ have difficulty understanding the restrictive nature of its beliefs. The Bible is taken very literally and very restrictively. For example, women are not allowed to hold any leadership positions of any kind. Women are not allowed to speak in any worship

service. Women are not allowed to lead singing, to make announcements or to teach in any group where men are present. Women are not allowed to go to business meetings of the church. Women have no vote in any meetings; women have no say in how the money collected is spent. Women are taught to "be in submission" at home and in the church.

6. In order to see how this doctrine affects teaching and academic freedom at Lipscomb, I recall a speech Hollis Todd, professor of the sociology department at Lipscomb and an elder at my church gave on November 22, 1992. (I took notes on it because it was a few days after my discovery deposition in the case of *Steele v. Industrial Development Board, et al.* and I was thinking about these issues.) He told how he required the students in his David Lipscomb University sociology class called "The Family" to answer a question on Ephesians 5. The question was whether they accepted the doctrine that a man must be "head" of the wife. He was shocked and upset that one of his students had once actually said she didn't agree with the scripture. He cited this incident as proof of "the rising tide of immorality." He did not state whether he graded the student poorly.

(J.A. at 622.)

During the years from 1990 to1992, at the time of the issuance of the bonds, more than 77% of the undergraduate students at Lipscomb were members of the Churches of Christ. (J.A. at 837, 1181.) According to the affidavit of W. Craig Bledsoe, the Provost at Lipscomb since 1997, 78.97% of the student body indicated that they were members of the Churches of Christ in 1991, while 71.42% of the student body so

indicated in 1997. (J.A. at 502.) Student applications for admission to Lipscomb during these years "required a character reference from a minister, youth minister or leader at church," without specifying the denomination of the church or the religion. (J.A. at 837.) As expressed in a brochure from Lipscomb, "[o]ne common thread that binds students together is their commitment to Christ. At Lipscomb a student's love for the Lord is strengthened by this special association with other students, the majority of whom share the same spiritual values." (J.A. at 1635.) In his affidavit, Bledsoe also stated that "there are numerous other religions represented in the student body including, for example, Buddhism, Lutheran, Muslim, Russian Orthodox, Hindu, Catholic, Mormon, Baptist, and Nazarene." (J.A. at 502). In his supplemental affidavit, Bledsoe averred that "Lipscomb does not discriminate against students on the basis of religion." (J.A. at 775.) Nevertheless, Dr. Sinclair testified in her deposition that students were pressured to become members of the Churches of Christ, particularly during chapel service. (J.A. at 1606-07.) Moreover, while Lipscomb provided its students with a list of local churches in the community, it only named those affiliated with the Churches of Christ. (J.A. at 835-36.) Lipscomb also acknowledges that it prohibits students from dancing, consuming alcohol, using tobacco, among other things, because it regards such conduct as being "un-Christian conduct." (J.A. at 308-309, 835, 1191-92, 1472-74.)

In response to recommendations made by the Southern Association of Colleges and Schools, Lipscomb undertook a major development project in the early 1990s to expand and renovate its campus to accommodate an increase in undergraduate enrollment to 3,000. To fund the project, Lipscomb applied for a $15 million, low-interest loan from the

Board.[3] Lipscomb requested funding to construct and equip a new library; renovate and convert the old library into administrative offices; construct an intramural building (or student activity center), an intramural field, four new tennis courts, and a baseball stadium; construct an addition to the Swang Business Center; make parking, landscaping and walkway improvements; and acquire computer and fiber optic equipment.

At a public meeting on April 10, 1990, the Board approved Lipscomb's request for the loan, which was financed by the issuance of $15 million in tax-exempt industrial development bonds, pursuant to the Board's authority under Tenn. Code Ann. § 7-53-101(11)(A)(vii). After another public hearing on May 30, 1990, the Board formally approved the issuance of the bonds. On May 31, 1990, Nashville Mayor Bill Boner approved the issuance of the bonds, as required for tax-exempt status

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[3] The Board is a public corporation created under the authority of Tenn. Code Ann. § 7-53-101 - § 7-53-311. Metro approved the creation of the Board by resolution as provided in Tenn. Code Ann. § 7-53-201. By law, all amendments to the corporate charter of the Board must also be approved by Metro. Tenn. Code Ann.§ 7-53-204 (1985). Under the statute, the Board has the authority to enter into loan agreements with third parties; it can sue and be sued; it can sell any of its properties; it can issue bonds and borrow money from banks and other financial institutions by issuing notes. Tenn. Code Ann. § 7-53-204. In addition, the Board has the authority to issue tax-exempt revenue bonds for various public work projects, including

> [a]ny nonprofit educational institution in any manner related to or in furtherance of the educational purposes of the institution, including, but not limited to classroom, laboratory, housing, administrative, physical education and medical research and treatment facilities.

Tenn. Code Ann. § 7-53-101(11)(A)(vii)(1990 Supp.). After the approval and sale of the tax-exempt bonds under the statute, the municipal governments that approve them are not liable for repayment of the debt. Tenn. Code Ann.§ 7-53-306 (1985).

under 26 U.S.C. § 147(f), thus certifying that the bonds served a public purpose.

The tax-exempt bonds were then sold to private investors (bondholders), and the proceeds from the bonds were loaned to Lipscomb, pursuant to the loan documents. According to the loan agreement, Lipscomb was not to use the project funds for sectarian instruction or religious worship. Lipscomb is also obligated to pay all sums due on the bonds. In January of 1991, the bonds were replaced by revenue refunding bonds titled "Educational Facilities Revenue Refunding Bonds, Series 1991."

Defendant Sovran Bank, as trustee for the bondholders, was assigned the loan documents. Sovran Bank provided the principal security for the bonds through a $15,969,453 irrevocable letter of credit for the account of Lipscomb to Sovran Bank, N.A. as trustee for the bondholders. Additional security was provided by a promissory note and loan agreement entered into by Lipscomb and the Board.

Plaintiffs are state and local taxpayers residing in Davidson County, Tennessee, who objected to the issuance of the bonds at public hearings and meetings of the Board held on April 10, April 16, and May 30, 1990.[4] At the meetings, Plaintiffs or their representatives complained that the issuance of the tax-exempt bonds for Lipscomb provided governmental support to a pervasively sectarian institution in violation of the Establishment Clause of the First Amendment of the U.S. Constitution. On May 30, 1991, Plaintiffs, as municipal taxpayers, commenced the instant action, challenging the validity of the Board's action in issuing tax-exempt revenue bonds for the benefit of Lipscomb.

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[4] The lead Plaintiff, Harold E. Steele, is no longer a party as a result of his death on April 1, 1998.

Eventually, on October 9, 1998, Metro and Lipscomb separately moved for summary judgment, alleging that the issuance of the tax-exempt revenue bonds did not violate the Establishment Clause. In support of their respective motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, both Metro and Lipscomb submitted separate statements of the undisputed material facts on October 9, 1998 and October 16, 1998, respectively. Plaintiffs responded to Defendants' statements of the undisputed material facts and filed documents in opposition to Defendants' motions for summary judgment. Plaintiffs also filed a statement of additional undisputed material facts in opposition to Defendants' motions on November 9, 1998. Both Defendants then responded to Plaintiffs' statement of additional undisputed material facts on November 20, 1998 and December 2, 1998, respectively.

At oral argument on May 10, 2000, the district court requested that Plaintiffs submit a cross-motion for summary judgment. Pursuant to the district court's order, Plaintiffs filed a motion for summary judgment on May 30, 2000, alleging that the issuance of the tax-exempt revenue bonds to Lipscomb violated the Establishment Clause because Lipscomb is so pervasively sectarian that a substantial portion of its functions is subsumed in its religious mission, and that the $15 million dollars in tax-exempt revenue bonds had the impermissible effect of promoting religion as a matter of law. In support of their motion for summary judgment, Plaintiffs submitted a statement of the undisputed facts. Thereafter, on July 3, 2000, Lipscomb submitted its verified response to Plaintiffs' statement of undisputed material facts in support of their motion for summary judgment.

On October 24, 2000, the district court entered a memorandum and order granting Plaintiffs' cross-motion for summary judgment and denying Lipscomb and Metro's

respective motions for summary judgment. The district court also issued a permanent injunction enjoining the Board and Metro from issuing any additional tax-exempt revenue bonds for the benefit of Lipscomb or any other pervasively sectarian institution. The district court further awarded Plaintiffs' nominal damages in the amount of $1.00 each and authorized attorneys' fees for Plaintiffs. Defendants then filed timely notices of appeal. Subsequently, Defendants filed a motion to stay further proceedings on the matter of attorneys' fee pending this appeal. On October 31, 2000, the district court granted the motion to stay proceedings on the attorneys' fee issue.

Metro also asked for a stay of the permanent injunction issued by the district court enjoining the Board and the Metro from issuing any additional tax-exempt revenue bonds for the benefit of Lipscomb or any other pervasively sectarian institution. On July 13, 2001, the district court denied Metro's motion for a stay pending appeal. Thereafter, in a motion filed on August 13, 2001, Metro appealed the district court's denial of its motion for a stay pending appeal. In an order entered on September 25, 2001, this Court denied the motion for a stay pending appeal.

DISCUSSION

At the outset, it should be noted that Plaintiffs challenge only the constitutionality of the Tennessee statute as applied, which authorized the Board to issue tax-exempt bonds to Lipscomb or any other pervasively sectarian institution. Thus, the issue squarely presented on appeal is whether the low-interest loan by the Board to Lipscomb funded through the issuance of the tax-exempt bonds violates the Establishment Clause because Lipscomb is a pervasively sectarian educational institution and the loan amounts to direct state aid.

The point of departure for analyzing whether the low-interest loan to Lipscomb through the issuance of the

tax-exempt bonds by the Board violated the Establishment Clause is the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), as refined by the Court in *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997), which merged the excessive government entanglement prong with the "primary effect" analysis. As the majority opinion notes, the *Lemon* test, as reformulated by *Agostini*, continues to have vitality. *See Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2476 (2002) (O'Connor, J. concurring opinion). In the present case, the question before us concerns whether the governmental action satisfies the "primary effect" test. Under this test, the Court in Agostini stated that the governmental aid is permissible if "it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* at 234. In the matter before us, the specific issue is whether the governmental aid results in excessive entanglement. In assessing whether there is excessive entanglement, the Court in *Agostini* stated that "we have looked to 'the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'" *Id.* at 232 (quoting *Lemon*, 403 U.S. at 615).

On appeal, Lipscomb first argues that the district court's grant of summary judgment in favor of Plaintiffs was erroneous because it rested upon a finding that Lipscomb is a pervasively sectarian educational institution. According to Lipscomb, "whether an institution is 'pervasively sectarian' is no longer a factor to be considered by the courts in these kinds of cases." Lipscomb's Br. at 7. However, as the majority opinion recognizes, the pervasively sectarian test has not been abandoned. In *Johnson v. Econ. Dev. Corp. of County of Oakland*, 241 F.3d 501, 510 n. 2 (6th Cir. 2001), this Court pointed out:

> The principle expressed in *Hunt v. McNair*, 413 U.S. 734 (1973), that government aid in the form of tax exempt revenue bonds of the type involved in this case violates the Establishment Clause--when provided to pervasively sectarian institutions--has not been disavowed, at least to my knowledge, by any subsequent majority opinion of the Supreme Court. *Accord Agostini v. Felton*, 521 U.S. 203, 233 (1997) (recognizing that under the Establishment Clause, the court must consider " 'the character and purposes of the institutions that are benefitted' . . . (e.g., whether the religious institutions were 'predominantly religious'")) (citing *Hunt*, 413 U.S. at 734-44).

241 F.3d at 510 n. 2 (parallel citations omitted.) Although the majority notes that the Court questioned "[t]he vitality of the pervasively sectarian test" in *Mitchell v. Helms*, 530 U.S. 793 (2000), we noted in *Johnson* that "it is Justice O'Connor's opinion [in *Mitchell*], which does not abolish the distinction between 'pervasively sectarian' and 'sectarian' institutions and which expressly declines to adopt Justice Thomas' expansive view, that is controlling upon this Court." *Id.*

Alternatively, Lipscomb claims that even if the pervasive sectarian test remains relevant, the district court's decision must be vacated and remanded for an evidentiary hearing because the court improperly "viewed ambiguous facts in a light least favorable to the non-moving party" in granting summary judgment in favor of Plaintiffs. Lipscomb's Br. at 7, n. 4. There is no merit to this claim because the district court based its decision on the undisputed facts in the record, which established as a matter of law that Lipscomb is a pervasively sectarian educational institution and that the loan transaction amounted to a direct economic benefit for Establishment Clause purposes.

The profile of a pervasively sectarian educational institution

In evaluating whether Lipscomb is a pervasively sectarian institution, our attention should be directed in the first instance to *Hunt v. McNair*, 413 U.S. 734 (1973), since it is the only case dealing with the precise issue at hand that yielded a majority opinion. In *Hunt*, the Supreme Court also addressed the issue of state aid to a religious school in a challenge to the validity of the South Carolina Educational Facilities Authority Act ("the Act"), under which revenue bonds were issued to the Baptist College at Charleston, South Carolina, a Baptist-affiliated college. Through the issuance of the revenue bonds, the Act provided assistance to higher educational institutions in constructing and financing projects, such as buildings, facilities, and site preparation, specifically excepting "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination." *Id.* at 736.

Applying the factors set forth in *Lemon*, the Court in *Hunt* held that the Act did not violate the Establishment Clause, finding in pertinent part that the statute did not have the primary effect of advancing or inhibiting religion insofar as the college did not have a significant sectarian orientation and the projects were limited to those with a secular purpose. In Hunt, the Supreme Court noted:

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are [sic] subsumed in the religious mission or when it funds a specifically

> religious activity in an otherwise substantially secular setting.

Id. at 743. The Court in *Hunt* concluded that the aid did not go to a pervasively sectarian institution, nor to fund specifically religious activities, and thus would not "place the Authority in the position of providing aid to the religious as opposed to the secular activities." *Id.* at 744. Although *Hunt* did not outline a test for identifying a pervasively sectarian institution, the Court found that the Baptist college in question was not pervasively sectarian inasmuch as "there are no religious qualifications for faculty membership or student admission, and that only 60% of the College student body is Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina." 413 U.S. at 743-44.

Notwithstanding the absence in *Hunt* of an explicit test for identifying a pervasively sectarian educational institution, the plurality opinion in *Roemer v. Bd. of Public Works of Md.*, 426 U.S. 736 (1976) set forth a profile of a pervasively sectarian educational institution for evaluating Establishment Clause claims. In *Roemer*, the Court considered an Establishment Clause challenge to the constitutionality of a Maryland statute providing public aid in the form of grants ("Sellinger grants") to colleges affiliated with the Roman Catholic Church. In *Roemer*, the plurality noted that "the focus of the debate" concerned whether the grant program had the primary effect of advancing religion and creating excessive church-state entanglement. As to the primary-effect question, the plurality in *Roemer* noted that "*Hunt* requires (1) that no state aid at all go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones, and (2) that if secular activities can be separated out, they alone may be funded." *Id.* at 755. In determining whether an institution was "pervasively sectarian," the plurality opinion in *Roemer* noted that it was necessary to "paint a general picture of the

institution, composed of many elements." *Id.* at 758. Summarizing the elements of a sectarian profile set forth in the Court's majority opinion in *Comm. for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 767-68 (1973), the plurality in *Roemer* stated:

> The elements of the "profile" were that the schools placed religious restrictions on admission and also faculty appointments; that they enforced obedience to religious dogma; that they required attendance at religious services and the study of particular religious doctrine; and that they were an 'integral part' of the religious mission of the sponsoring church; that they had religious indoctrination as a 'substantial purpose'; and that they imposed religious restrictions on how and what the faculty could teach.

Roemer, 426 U.S. at 753 n. 18 (citing *Nyquist*, 413 U.S. at 767-68).

In light of the views expressed in the majority opinions in *Hunt* and *Nyquist*, the proper starting point for evaluating the Establishment Clause challenge in this case is to adopt the profile for a pervasively sectarian educational institution stated by the plurality in *Roemer*, as this most closely adheres to Supreme Court precedent expressed in majority opinions on this topic. *See Agostini*, 521 U.S. at 237 (noting that "the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions").

It should be noted that this approach accords with that taken by the Fourth Circuit in *Columbia Union Coll. v. Clarke*, 159 F.3d 151 (4th Cir. 1998) ("*Columbia Union I*"), which adopted a four-factor test that is essentially a restatement of the Supreme Court's profile of a pervasively sectarian educational institution. In *Columbia Union I*, the Fourth Circuit identified

four "general areas of inquiry" in determining whether a school is pervasively sectarian: "(1) does the college mandate religious worship; (2) to what extent do religious influences dominate the academic curriculum, (3) how much do religious preferences shape the college's faculty hiring and student admission processes, and (4) to what degree does the college enjoy 'institutional autonomy' apart from the church with which it is affiliated." *Id.* at 163. Although the Fourth Circuit asserted that a college is not pervasively sectarian unless it possesses a "great many" of the characteristics identified in the four-factor test, 159 F.3d at 163, there is nothing clearly stated in prior Supreme Court precedent to the effect that a pervasively sectarian instruction must possess "a great many" of the relevant characteristics; rather, the focus of the inquiry is whether religion so permeates the secular education functions provided by a religious-affiliated educational institution that its religious and secular educational functions are in fact inseparable. Further, I take issue with the statement by the Fourth Circuit in *Columbia Union I* that "because the Supreme Court has never held any institution of higher education to be 'pervasively sectarian,' we lack even a clear 'general picture' of a 'pervasively sectarian' college or university." 159 F.3d at 163. In my view, the general profile of a pervasively sectarian institution is not as difficult to discern from Supreme Court jurisprudence as the Fourth Circuit purports it to be. Although the Fourth Circuit correctly recognized that "[n]either the Supreme Court, nor any circuit court to our knowledge, has ever found a college to be pervasively sectarian," *id.* at 169, it is clear that the Supreme Court certainly left open this possibility. *See Hunt*, 413 U.S. at 743 (citing *Tilton v. Richardson*, 403 U.S. 672, 682 (1971)); *see also Va. Coll. Bldg. Auth. v. Lynn*, 260 Va. 608, 538 S.E.2d 682 (Va. 2000) (applying the elements of the Roemer test to find that Regent University, created under the auspices of the Christian

Broadcasting Network, Inc., is a pervasively sectarian institution).

Lipscomb fits the profile of a pervasively sectarian educational institution

Viewing the undisputed facts, the district court properly concluded that Lipscomb is, as a matter of law, a pervasively sectarian educational institution. First, the record indicates that Lipscomb places religious restrictions on admission, and that more than 70% of the student body belongs to the Churches of Christ. Lipscomb also places religious restrictions on faculty and staff appointments, requiring that all personnel, with limited exceptions, be members in good standing of the Churches of Christ. Specifically, all members of Lipscomb's faculty and staff are expected to attend daily chapel and adhere to church doctrines. Further, faculty members are contractually bound to promote the beliefs of the Churches of Christ, both in and out of the classroom, and if any member leaves the church, it is an immediate ground for termination of employment. As noted by the district court, Lipscomb also reserves the right under Title VII of the Civil Rights Act of 1964 (as amended) to discriminate, "where it is necessitated by the specific religious tenets held by the institution."

Second, Lipscomb enforces obedience to its religious dogma, directing that the Bible be taught "every school day to every student enrolled . . . by teachers who are sound in the faith and faithful in their lives to its sacred truths." According to Lipscomb, its "supreme purpose" is "to teach the Bible as the revealed will of God to man and as the only and sufficient rule of faith and practice, and to train those who will attend in a pure Bible Christianity."

Third, Lipscomb requires its students to participate in daily Bible study and attendance at chapel. According to Lipscomb, "[t]he university has no authority to suspend [the daily Bible]

requirement for any student." As the district court found, all students must take at least one Bible class every day of each semester and are required to take at least one course from each of the following four categories: The Gospels, The Church, Old Testament, and Defense of the Faith. According to Lipscomb, the Bible is the inspired word of God, and students are encouraged to apply Biblical principles in conducting the affairs of their personal and professional lives. Students are also required to pass Bible courses, and the failure to do so results in being placed on "Bible probation," which could lead to expulsion. From 1988 to 1992, approximately 100 students were placed on Bible probation. In addition, students are required to attend chapel every school day, and the failure to do so may lead to being placed on "chapel probation."

Fourth, attendance at chapel and the study of the Bible at Lipscomb are an "integral part" of the religious mission of the Churches of Christ. This is made clear repeatedly throughout Lipscomb's Faculty and Student Handbooks, as well as its university catalogues.

Fifth, religious indoctrination is a "substantial purpose" at Lipscomb. As set forth in Lipscomb's corporate charter and bylaws of the Board of Directors, "[t]he corporation was organized for the purpose of teaching the word of God and the various branches of the useful knowledge, commonly taught in institutions of learning for the following general purpose: . . . the support of public worship, the building of churches and chapels and the maintenance of missionary undertakings." Moreover, as the district court noted, "[t]he land on which the construction projects funded by the bond proceeds were undertaken is subject to restrictive covenants that require that the property be used exclusively to further the religious mission of the institution so long as the property is owned by Lipscomb." *Steele v. Indus. Dev. Bd. of the Metro. Gov. of*

Nashville and Davidson County, 117 F.Supp.2d 693, 710 (M.D. Tenn. 2000).

Sixth, Lipscomb imposes religious restrictions on how and what the faculty teach. As Lipscomb acknowledges, it does not subscribe to the AAUP's Statement of Principles on Academic Freedom. Specifically, there was unrebutted testimony that Lipscomb instructs the faculty in the Biology and Physics Departments to "teach creationism." By Lipscomb's own admission, the religious tenets of the Churches of Christ are designed to permeate every facet of the University, including classroom instruction in subjects that are considered non-religious or nonsectarian.

Here, the record shows that Lipscomb satisfies all the elements of a sectarian educational institution profile, conclusively demonstrating that religion pervades it to such an extent that "its functions are subsumed in the religious mission." *Hunt*, 413 U.S. at 743. Accordingly, there is no genuine issue of material fact about whether Lipscomb is a pervasively sectarian educational institution.

Lipscomb is clearly distinguishable from educational institutions found not to be pervasively sectarian

As an educational institution, Lipscomb is clearly distinguishable from those higher educational institutions that the Supreme Court has found not to be pervasively sectarian. For example, in *Tilton v. Richardson*, 403 U.S. 672 (1971), the Supreme Court found that a direct federal grant awarded pursuant to the Higher Education Facilities Act of 1963 to four colleges and universities affiliated with the Roman Catholic Church for the construction of academic facilities devoted to secular purposes did not violate the Establishment Clause, except for the section of the Act that limited federal interest in the facilities to a period of twenty years because it allowed the unconstitutional contribution of valuable property to a religious

institution, and could be "used to promote religious interests." 403 U.S. at 683. The colleges in *Tilton* were described in the following terms:

> All four schools are governed by Catholic religious organizations, and the faculties and student bodies at each are predominantly Catholic. Nevertheless, the evidence shows that non-Catholics were admitted as students and given faculty appointments. Not one of these four institutions requires its students to attend religious services. Although all four schools require their students to take theology courses, the parties stipulated that these courses are taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize. Indeed, some of the required theology courses at Albertus Magnus and Sacred Heart are taught by rabbis. Finally, as we have noted, these four schools subscribe to a well-established set of principles of academic freedom, and nothing in this record shows that these principles are not in fact followed. In short, the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education.

Id. at 686-687. Unlike *Tilton*, where the theology courses at the colleges affiliated with the Roman Catholic Church were "taught according to the academic requirements and the teacher's concept of professional standards," without attempting "to indoctrinate students or to proselytize," the

religion classes at Lipscomb are Bible classes, not theology classes. At Lipscomb, Bible classes are taught as "the revealed will of God to man and as the only and sufficient rule of faith and practice, and to train those who will attend in a pure Bible Christianity, excluding from the faith all opinions and philosophies of men, and from the work and worship of the church of God all human inventions and devices," except those that "will aid in the understanding and teaching of the Scriptures."

Lipscomb also clearly differs from the Baptist college in *Hunt*. As already noted, the Baptist College at Charleston was not found to be a pervasively sectarian educational institution based upon the fact that it did not impose religious qualifications on its faculty and staff and given that the percentage of the student body roughly reflected the same percentage of Baptists in the area. Unlike the college in *Hunt*, which did not hire faculty on the basis of religion, apart from those teaching in the theology departments, Lipscomb requires that its faculty be members in good standing of the Churches of Christ. Further, the fact that the student body at Lipscomb is largely affiliated with the Churches of Christ reflects Lipscomb's placement of religious restrictions on student admissions.

Lipscomb is also clearly distinguishable from the Roman Catholic colleges in *Roemer*, which were "characterized by a high degree of institutional autonomy" from "their formal affiliation with the Roman Catholic Church." *Roemer*, 426 U.S. at 755. By contrast, Lipscomb's "supreme purpose" is "to teach the Bible as the revealed will of God to man and as the only and sufficient rule of faith and practice, and to train those who will attend in a pure Bible Christianity." Further, unlike the colleges in *Roemer*, Lipscomb does not subscribe to the AAUP's Statement of Principles on Academic Freedom. Moreover, unlike the colleges in *Roemer*, where attendance at

religious exercises was not required and where spiritual development was encouraged as a "secondary objective," Lipscomb requires attendance at religious service, placing those who fail to attend on "chapel probation," and clearly promotes spiritual development as the primary objective of the institution. While the colleges in *Roemer* gave mandatory religion and theology courses taught "primarily by Roman Catholic clerics," those courses only supplemented "a curriculum covering 'the spectrum of a liberal arts program.'" *Roemer*, 426 U.S. at 756. In contrast, the Bible classes at Lipscomb are central to the mission of the school, and the failure to pass a Bible course results in a student being placed on "Bible probation," which subjects the student to dismissal from the school if he or she does not pass every Bible course taken while on Bible probation. Lipscomb thus clearly stands separate and apart from the higher educational institutions that the Supreme Court has found not to be pervasively sectarian.

It should also be noted that Lipscomb is markedly different from the religious academy in *Johnson* that this Court found not to be pervasively sectarian. In *Johnson*, this Court described the religious academy in the following terms:

> As to the nature of the institution, as with any religiously affiliated school, the Academy pledges its allegiance to its faith. Nevertheless, the facts establish that the Academy is not a pervasively sectarian institution. The Academy's Restated Articles of Incorporation provide that the school's purpose is to "conduct an independent Catholic school from pre-school through and including the 12th grade, wherein the arts and sciences, and other forms of primary and secondary learning are taught, and diplomas and honors therein conferred: while maintaining a philosophy consonant with that of the network of the Sacred Heart schools of which it is a

member." (J.A. at 66.) The Academy's curriculum and requirements provides that

> [e]very student at [the Academy] receives intensive training in the basic academic skills of English, Mathematics, History, Foreign Language and Science. Art, Music, Drama, Forensics, Theology and Computer Science are essential parts of this program. [The Academy] offers each student a full Physical Education Program designed to develop a sense of sportsmanship, a respect for physical fitness and an awareness of the enjoyment derived from athletic endeavors.

(J.A. at 154.) A review of the course descriptions and the subjects covered for each of the courses offered at the Academy, with the exception of the Religion Department, demonstrates that the Academy does not interject religion into every aspect of its curriculum. Moreover, there are no religious requirements for membership on the Academy's Board of Trustees. Non-Catholics have served, and currently serve, on the Board.

In addition, the Academy does not discriminate on the basis of race, color, creed, or national origin in its admissions process, nor does it give preference in admission to Roman Catholics. Furthermore, the Academy does not discriminate on the basis of race, color, or national origin in any of its educational policies, scholarship and loan programs, athletic or extracurricular activities, or other-school administered programs. As of the date of the issuance of the bonds at issue, 135 of the 366 (non-preschool) students at the Academy, or 37%, were not Catholic. And as of the date of the stipulation, 34% of the students were not Catholic. The facts indicate that faiths represented in the Academy student body include

non-Catholic Christian, Jewish, Islamic, Shinto and others. Finally, the Academy does not discriminate on the basis of race, color, creed or national origin in the hiring of its employees. The Academy has a teaching faculty of 60, of whom five are members of religious orders. There is no religious-affiliation requirement or preference for the Academy's teachers, and the school does not inquire as to the religious affiliation of prospective faculty members.

Johnson, 241 F.3d at 516-17. Most striking, Lipscomb, unlike the academy in *Johnson*, interjects religion into virtually all aspects of its institutional life. Further, unlike the school in *Johnson*, Lipscomb reserves the right under Title VII of the Civil Rights Act of 1964 to discriminate in the hiring of faculty and staff on the basis of religion.

Lipscomb is also distinguishable from Columbia Union College, the educational institution affiliated with the Seventh Day Adventist Church that the Fourth Circuit did not regard as a pervasively sectarian educational institution. *See Columbia Union Coll. v. Oliver*, 254 F.3d 496 (4th Cir. 2001) ("*Columbia Union II*"). In *Columbia Union II*, the Fourth Circuit stated:

> The district court respected fully the majority's order of remand in *Columbia Union I*. Working through the four factors in this case, the court found that although Columbia Union had a mandatory worship policy, it applied only to a minority of students. With regard to the second factor, the court held that the evidence submitted by the Commission was insufficient to show that the traditional liberal arts classes were "taught with the primary objective of religious indoctrination." The court pointed to "affirmative evidence indicating that secular education is the primary goal of" Columbia Union. The court examined the college's mission statement

> and the descriptions of secular curricula in the college's catalog, among other things, in making this finding. The court looked at the college's syllabi for secular courses and determined that the religious references were too isolated and scattered to justify a finding that religion permeates the secular courses. And although the court found that the Seventh-day Adventist Church exerted a dominance over college affairs and that the college gave an express preference in hiring and admissions to members of the Church, these factors by themselves were not enough to make the college a pervasively sectarian one.

Id. at 508-09. In contrast to Columbia Union College, Lipscomb has a mandatory worship policy and imparts instruction with the primary objective of religious indoctrination. Lipscomb also places religious restrictions on admission and expressly hires faculty and staff based upon membership in the Churches of Christ.

Indeed, Lipscomb is even more pervasively sectarian than Regent University ("Regent"), the only other institution that has been found by a court to be a pervasively sectarian institution for Establishment Clause purposes. As noted by the Virginia Supreme Court in *Lynn*,

> Regent's Articles of Incorporation, provide that:
>
> > [Regent] shall exist for the purpose of bringing glory to God and His Son Jesus Christ by providing an institution or institutions of learning in which those who are mature in the knowledge of God and His ways can assist and guide, in a spirit of free inquiry and scholarly excellence, those who would learn of Him, His ways, and His creation, while together they study ways to glorify God and better their world.

538 S.E.2d at 685. *Lynn* also noted that Regent has adopted a Statement of Faith that provides,

> Regent University is a Christ-centered institution. The Board of Trustees, along with the faculty and staff of the university, are committed to an evangelical interpretation and application of the Christian faith. The campus community is closely identified with the present-day renewal movement, which emphasizes the gifts, fruit and ministries of the Holy Spirit. It is expected that all trustees, officers, administrators and faculty will subscribe to this statement in writing[.]

Id. Regent's Mission Statement provides:

> Preamble--Regent University is a graduate institution that exists to bring glory to God the Father and His Son Jesus Christ through the work of the Holy Spirit.
>
> Mission--Our mission is to provide an exemplary graduate education from biblical perspectives to aspiring servant leaders in pivotal professions and to be a leading center of Christian thought and action.
>
> Vision--Our vision, through our graduates and other scholarly activities, is to provide Christian leadership in transforming society by affirming and teaching principles of truth, justice and love as described in the Holy Scriptures, embodied in the person of Jesus Christ, and enabled through the power of the Holy Spirit.

Id. In spite of its religious mission, Regent does not have any "specific religious requirement for student admissions, and "the lack of such a '[Christian] commitment' does not negatively impact an applicant's standing for admission." *Id.* at 686. However, the Virginia Supreme Court noted that "[a]ll applicants are required to submit a 'Clergy Recommendation,'

both as a matter of policy and practice. Among the questions asked is whether the applicant has 'made a meaningful personal commitment to Jesus Christ.'" *Id.* The Virginia Supreme Court in *Lynn* further remarked:

> Although encouraged to do so, students are not required to attend Regent's weekly corporate chapel services or participate in any particular religious activities. However, they must have "[p]ersonal goals consistent with the mission and goals of Regent University," and must submit a "[p]ersonal goals statement" addressing how their "personal and spiritual objectives" relate to Regent's "Christ-centered educational philosophy." The instructions explain that "for the Christian, [a goal] is a statement of faith in God's will for his or her life."
>
> Faculty, unlike students, are required to sign a document indicating their adherence to the "Statement of Faith." They are "strongly encouraged but they're not required" to attend chapel. The faculty is required to integrate "faith and learning." Dr. Selig testified, and the SACS (Southern Association of Colleges and Schools) and the ABA (American Bar Association) agree, that the Statement of Faith has not interfered with academic freedom. Regent's detailed academic freedom policy encourages faculty to "pursue truth . . . by research, discussion, and other forms of inquiry." Nonetheless, Regent prohibits faculty from using "their position or classroom as a platform to demand adherence by students to a personal theological viewpoint, political preference or social agenda." The SACS in a review of Regent's accreditation application in 1998 found that "[f]aculty and students are free to examine all pertinent data, question assumptions, be guided by the evidence of

> scholarly research, and teach and study the substance of a given discipline." With respect to its curriculum, each faculty member at Regent is required to include in the syllabus for each class a "description of how the Christian faith and the Bible will be incorporated into the course."

Id. at 617-18.

Like Regent, the "supreme purpose" of Lipscomb is to promote Christian ideals. Both Lipscomb and Regent also require applicants to submit a recommendation from a member of the clergy, without specifying the denomination. However, unlike Regent, nearly three-quarters of the students at Lipscomb are identified with a particular creed, the Churches of Christ. Further, in contrast to Regent, which encourages, but does not require, its students to attend chapel services or to participate in certain religious activities, daily Bible class and chapel attendance are mandatory at Lipscomb. In addition, while both schools require its faculty to adhere to religious principles and to incorporate the Bible into class instruction, Regent provides much greater latitude in terms of academic freedom than Lipscomb. Thus, even among pervasively sectarian religious institutions, Lipscomb clearly stands out as unrelentingly sectarian in its policies and practices.

The issuance of tax-exempt revenue bonds in this case constitutes direct aid within the meaning of the Establishment Clause

Given that Lipscomb is a pervasively sectarian educational institution, it thus must be determined whether the issuance of the tax-exempt revenue bonds is a direct or indirect benefit for Establishment Clause purposes. In this regard, it should be noted that because *Hunt* found that the Baptist College at Charleston was not a sectarian educational institution, it did not need to decide the issue whether the issuance of the revenue

bonds constituted direct state aid in that case. In a footnote, though, the Court in *Hunt* remarked:

> The 'state aid' involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a 'governmental service.' *Clayton v. Kervick*, 56 N.J. 523, 530-531, 267 A.2d 503, 506-507 (1970). The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit." 258 S.Ct., at 107, 187 S.E.2d, at 650. ***Because we conclude that the primary effect of the assistance afforded here is neither to advance nor to inhibit religion under Lemon and Tilton, we need not decide whether, as appellees argue, Brief for Appellees 14, the importance of the tax exemption in the South Carolina scheme brings the present case under Walz v. Tax Comm'n, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), where this Court upheld a local property tax exemption which included religious institutions.***

413 U.S. at 745 n. 7 (emphasis added). Equally, in *Johnson*, this Court declined to resolve whether a very similar type of tax-exempt revenue bond issue amounts to a direct benefit because it held that the religious academy was not a pervasively sectarian educational institution. 241 F.3d at 511, n. 3. However, unlike those cases in which the institutions were found not to be pervasively sectarian, the issue must be directly confronted here because Lipscomb is an institution in which religion is so pervasive that a substantial portion of its functions is subsumed in the religious mission so as to suggest that the state aid to Lipscomb has the primary effect of advancing religion.

In deciding this question, it is advisable to make some preliminary observations. First, although the majority opinion correctly notes that this precise issue has not been addressed by other circuits or by the Supreme Court, it inaccurately states that all the state courts that have addressed the issue "have found that the issuance of industrial revenue bonds is not tantamount to the giving of direct aid to religious schools." Opn. at n. 2. However, with the exception of the Virginia Supreme Court's decision in *Lynn*, 538 S.E.2d at 682, none of the cases cited by the majority has addressed the precise question at hand, namely, whether tax-exempt bond financing to a pervasively sectarian educational institution constituted a form of direct state aid, having the primary effect of advancing religion, in violation of the Establishment Clause. Indeed, as noted by the California Supreme Court in *Calif. Educ. Facilities Auth. v. Priest*, 526 P.2d 513, 518, n. 8 (Cal. 1974), one of the cases cited by the majority:

> Of course, if the Authority were to exercise its powers in aid of an institution which is pervasively sectarian within the meaning of the *Hunt* test, a different conclusion might be compelled.

> "Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these (disqualifying) characteristics." *(Tilton v. Richardson* (1971) *supra*, 403 U.S. 672, 682.)) We emphasize, however, that the fact an institution of higher education is affiliated with or governed by a religious organization is insufficient, without more, to establish that aid to that institution impermissibly advances religion. (*See Hunt v. McNair* (1973) *supra*, 413 U.S. 734, 743; *Tilton v. Richardson* (1971) *supra*, 403 U.S. 672, 686-687.)

Priest, 526 P.2d at 518, n. 8 (parallel citations omitted.)

Further, contrary to the suggestion in the majority opinion, it is of no moment that "[t]he Board has arranged tax-exempt financing, for example, for a number of colleges and universities with and without a religious affiliation, as well as for low-income housing projects, the Country Music Hall of Fame, the Easter Seal Society, retirement centers, the Jewish Community Center, the Young Mens Christian Association, Nashville Public Radio." As recognized by the Supreme Court, there is a distinction between a "pervasively sectarian" institution and a "religiously affiliated" one. *See Johnson*, 241 F.3d at 510 ("A pervasively sectarian institution is one whose religious functions cannot be separated from its non-religious functions; an institution is not pervasively sectarian merely because it is religiously affiliated.") (citing *Hunt*, 413 U.S. at 743); *Columbia Union I*, 159 F.3d at 158 (citing *Roemer*, 426 U.S. at 750.) Further, it is of no legal significance that "no claim is made that the Board ever favored or disfavored one religion over another." *See Zelman*, 122 S. Ct. at 2505 (Breyer, J. dissenting opinion) (noting "the development of constitutional doctrine that reads the Establishment Clause as

avoiding religious strife, *not* by providing every religion with an *equal opportunity* (say, to secure state funding or to pray in public schools), but by drawing fairly clear lines of separation between church and state") (emphasis in original). What matters in this case, then, is only whether the state aid provided to Lipscomb, a pervasively sectarian institution, is in violation of the Establishment Clause.

The district court properly concluded that the Establishment Clause was violated because Lipscomb received a direct economic benefit from the government, which resulted in excessive entanglement of the government with the religious institution. Although the district court noted that "[t]here is no single, clear definition of 'direct benefit' to control this analysis," Black's Law Dictionary defines "direct" in the relevant sense as "[i]mmediate; proximate; by the shortest course; without circularity; operating by an immediate connection or relation, instead of operating through a medium; the opposite of *indirect*." Black's Law Dictionary 459 (6th ed. 1990). In contrast, "indirect" is defined as "[n]ot direct in relation or connection; not having an immediate bearing or application; not related in the natural way." *Id.* at 773.

As the district court correctly noted, the Board and Metro were both directly connected to the project benefiting Lipscomb. According to the official statement regarding the issuance of $15 million in educational facilities refunding bonds,

> The Issuer [the Board] was created on May 6, 1959 pursuant to the Act as a public corporation and instrumentality of the Metropolitan Government of Nashville and Davidson County, Tennessee, for the purpose, among other things, of financing educational facilities with a view to promoting the education of the people of the State of Tennessee. The Issuer is

> authorized by the Act to issue revenue bonds, including refunding bonds, payable solely from the revenues and receipts from any such facilities and secured by a pledge of said revenues and receipts.

(J.A. at 130-31.) Thus, contrary to the protestations of the Board and Metro, it is clear that because the Board is an instrumentality of Metro, both Defendants were involved in the project benefiting Lipscomb, notwithstanding their separate legal identity. Further, the district court properly rejected Metro's contention that it could not be liable for an Establishment Clause violation in this case because it only provided "host approval" for the bonds to be federally tax exempt. As the district court properly noted, Metro's role in the financing was critical because the bonds could not have been issued as federally tax exempt without Metro's participation in approving the bond issue.

Under the terms of the statute, local governments are authorized to offer low-interest loans by making funds available through the issuance of tax-exempt municipal bonds. Here, Lipscomb approached the Board seeking a low-interest development loan funded by the proceeds of the tax-exempt bond issuance. While the money that went to Lipscomb ultimately came from private investors who purchased the tax-exempt revenue bonds, and while Lipscomb must repay Sovran Bank for the loan, the direct economic benefit that Lipscomb received from the governmental entities, as the district court pointed out, was the low-interest "loan from the Board and, hence, from Metro." *Steele*, 117 F. Supp.2d at 717.

Thus, even though there was no direct transfer of money from the Board to Lipscomb, the district court correctly found that "[t]he money went directly to Lipscomb in the form of a loan from the Board, an instrumentality of Metro." *Id.*, 117 F.

Supp.2d at 720. As a result of the low-interest loan of $15 million originated by the Board at Lipscomb's request, Lipscomb thus saved about 30% of the cost of its campus building projects. These savings enabled Lipscomb to fund the new library, intramural sports building and field, parking lots, landscaping, computer mainframe, baseball stadium, tennis courts, fiber optic network, a pedestrian walkway, and renovate its administration and business school buildings. Through the low-interest loan, Lipscomb was thereby able to improve its facilities to increase its student enrollment to 3,000, and thus advance its sectarian mission.

The district court also properly rejected Defendants' argument that Lipscomb's economic benefit came from the bond purchasers who purchased the tax-exempt revenue bonds, and not from the government. Properly understood, Lipscomb received a direct economic benefit in the form of a low-interest government sponsored loan. For Establishment Clause purposes, it is immaterial that the Board subsequently assigned the loan to Sovran Bank.

The district court also correctly rejected Defendants' argument that the bondholders, not Lipscomb, are the true beneficiaries of the aid program. As the district court properly noted, the Supreme Court in *Hunt* examined a similar transaction and found that "[t]he income tax-exempt status of the interest enables the Authority, as an instrumentality of the State, to market the bonds at a significantly lower rate of interest than the educational institution would be forced to pay if it borrowed the money by conventional private financing." *Steele*, 117 F.Supp.2d at 717 (quoting *Hunt*, 413 U.S. at 739). Thus, the district court rightly concluded that "Lipscomb received a flow of funds into its coffers provided by a loan from the Board. These funds did not merely supplement the teaching of secular subjects at Lipscomb; they were central to the school's stated goal of increasing enrollment. If Lipscomb's

mission is to promote Churches of Christ doctrine, then Metro, through the Board, provided aid to promote Churches of Christ doctrine." *Steele*, 117 F. Supp.2d at 718.

It should be pointed out, at this juncture, that characterizing the role of the state as a "mere conduit" on the basis that the use of governmental funds is not involved ignores the fundamental character of the government's participation in this kind of financing arrangement. In this respect, it is important to examine the reasoning of the Virginia Supreme Court in *Lynn*, which found that the governmental aid involved in the revenue-bond financing in that case did not amount to "direct aid" to Regent University, a pervasively sectarian educational institution, because no governmental aid was received by the University since the bond proceeds are funds of private investors. 538 S.E.2d at 638. According to *Lynn*, "Regent receives these funds because of the genuinely independent choices of investors," whose decisions to purchase the bonds "cannot be attributed to state decision making." *Id.* at 639 (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993)). Accordingly, the Virginia Supreme Court concluded that there was no Establishment Clause violation because "[n]o government funds ever reach Regent's coffers." *Id.*

What is being ignored in this account is the fact that the government provides the pervasively sectarian educational institution with a direct economic benefit in the form of a low-interest loan, which the institution would not be able to obtain without the direct participation of the government. Thus, although it is true that no state funds are being transferred through this kind of financing mechanism, the relevant question is whether the government has provided the pervasively sectarian educational institution with a direct economic benefit. Contrary to the understanding of the court in *Lynn*, a direct economic benefit is not necessarily determined by merely

looking at whether there was a transference of governmental money. To constitute a direct economic benefit to a pervasively sectarian educational institution, it is sufficient that the government makes it possible for the institution to obtain economic aid that it would not otherwise be able to obtain without the government's direct participation. That no governmental funds actually reach the coffers of the pervasively sectarian educational institution does not alter for one moment the fact that a direct economic benefit accrues to such an institution as a result of the government's active participation in arranging for a low-cost loan that enables the institution to advance its sectarian mission.

In view of the government's direct involvement with advancing the religious mission of a pervasively sectarian educational institution, it cannot be said that this form of state aid comes within *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), where the Supreme Court upheld a property tax exemption to religious organizations for properties used solely for religious worship. *See Hunt*, 413 U.S. at 745 n. 7. As noted in the concurring opinion of Justice Brennan in *Walz*, while general subsidies of religious activities would constitute impermissible state involvement with religion, tax exemptions "constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright government subsidy." *Walz*, 397 U.S. at 690-91. As explained by Justice Brennan:

> Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from the taxpayers as a whole. An exemption, on the other hand, involves no such transfer. It assists the exempted enterprise only

> passively, by relieving a privately funded venture of the burden of paying taxes.

Id. (footnotes omitted.) Thus, in finding that the property exemptions in question did not rise to the level of excessive governmental involvement, Justice Brennan noted:

> To the extent that the exemptions further secular ends, they do not advance "essentially religious purposes." To the extent that purely religious activities are benefited by the exemptions, the benefit is passive. Government does not affirmatively foster these activities by exempting religious organizations from taxes, as it would were it to subsidize them. The exemption simply leaves untouched that which adherents of the organization bring into being and maintain.

Id. at 693.

Although no state funds were transferred through the revenue-bond financing employed in this case, the form of state aid at issue, however, exhibits the "affirmative involvement characteristic of outright governmental subsidy." *Id.* at 691. Here, the Board and Metro do not play a "passive" role, but rather "affirmatively foster" the activities of Lipscomb by acceding to its request for a low-interest loan funded by tax-exempt revenue bonds. Moreover, the tax-exempt revenue financing does not "simply leave[ ] untouched that which adherents of the organization bring into being and maintain." *Id.* Instead, the issuance of the low-interest loan to the pervasively sectarian educational institution in this case "employs the organs of government for essentially religious purposes" by allowing Lipscomb to fund improvements to its University in order to advance its sectarian mission. *Id.* By providing a low-interest loan funded by tax-exempt revenue bonds to a pervasively sectarian educational institution, the

Board and Metro provided the kind of state aid that is characteristic of a direct governmental subsidy.

Consequently, given Lipscomb's pervasively sectarian character, it must be concluded that Lipscomb's receipt of a direct economic benefit in the form of a low-interest $15 million loan resulted in excessive governmental entanglement with the religious mission of the University. In view of Lipscomb's "character and purposes," *Agostini*, 521 U.S. at 232 (quoting *Lemon*, 403 U.S. at 615), its "secular activities cannot be separated from sectarian ones." *Roemer*, 426 U.S. at 755. Because the religious and secular functions are inseparable at Lipscomb, "no safeguard can ensure that direct monetary aid, even if designated to fund the school's secular functions, will not aid its religious mission." *Columbia College I*, 159 F.3d at 158 (citing *Roemer*, 426 U.S. at 758 n. 21.) So even though the loan agreement explicitly prohibits Lipscomb from using any bond-financed facilities for religious purposes, there is no way to prevent that from happening here because of the University's pervasively religious character. Since the sectarian and secular activities at Lipscomb are so inextricably intertwined, the government cannot avoid excessive entanglement with the sectarian mission of the University. *Agostini*, 521 U.S. at 234. Accordingly, the low-interest loan arranged by the Board through the issuance of the tax-exempt revenue bonds to Lipscomb results in a violation of the Establishment Clause. Indeed, it is not at all clear that Lipscomb would have been able to proceed with its construction and renovation project without the issuance of the tax-exempt revenue bonds; certainly, the record indicates that it would not have been possible to proceed on such financially favorable terms.

The Supreme Court's recent decision in *Zelman*, 122 S. Ct. at 2460, does not alter this conclusion, but indeed supports it. As noted by the Court in *Zelman*, "our decisions have drawn a consistent distinction between government programs that

provide aid directly to religious schools . . . and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Id.* at 2465 (citations omitted.).[5] The Court added:

> *Mueller* [*v. Allen*, 463 U.S. 388 (1983)], *Witters* [*v. Washington Dept. of Servs. for Blind*, 474 U.S. 481 (1986)], and *Zobrest* [*v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993)] thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

Id. at 2467.

The situation is quite different, though, when the government aid program provides a direct economic benefit to a pervasively religious educational institution and thereby advances its religious objectives. For unlike state aid to

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[5] The majority opinion runs this distinction together, citing in footnote three cases involving government aid provided directly to religious schools with those involving government aid that reaches religious schools through individuals.

individual recipients who choose to advance the religious mission of an educational institution, the government's role does not end with the disbursement of benefits when economic aid is made directly to a pervasively religious educational institution, such as Lipscomb. In the case of a pervasively sectarian educational institution, such direct economic aid by the state is, by definition, inextricably intertwined with the religious mission of the school so as to establish that the government is endorsing the sectarian character of the institution in violation of the Establishment Clause of the United States Constitution. To permit such state aid to a pervasively sectarian educational institution does not merely "remove a brick from the wall that was designed to separate religion and government," *Zelman*, 122 S. Ct. at 2485 (Stevens, J. dissenting opinion); it leaves a gaping hole in the wall separating church and state.

CONCLUSION

Based upon the foregoing, I would **AFFIRM** the district court's order granting Plaintiffs' motion for summary judgment, denying Defendants' motions for summary judgment, and entering a permanent injunction prohibiting the Board and Metro from issuing additional tax-exempt bonds to Lipscomb or tax-exempt bonds to any pervasively sectarian institution.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-6646/00-6647/00-6648/00-6649

HAROLD E. STEELE; DON PETERSON; Rev. DAVID MAYNARD; HARMON WRAY; Rev. TOM BAKER, JR.,
Plaintiffs-Appellees,

v.

INDUSTRIAL DEVELOPMENT BOARD OF METROPOLITAN GOVERNMENT NASHVILLE (00-6648); METROPOLITAN GOVERNMENT OF NASHVILLE (00-6646); DAVID LIPSCOMB UNIVERSITY (00-6647); NATIONSBANK (00-6649); NATIONSBANK/TENNESSEE (00-6649),
Defendants-Appellants.

Before: NORRIS and CLAY, Circuit Judges; SARGUS, District Judge.

JUDGMENT

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.

FILED
AUG 14 2002
LEONARD GREEN, CLERK

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's grant of summary judgment in favor of the

plaintiffs is REVERSED. IT IS FURTHER ORDERED that the district court's denial of summary judgment as to defendants Metropolitan Government of Nashville and David Lipscomb University is REVERSED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

HAROLD E. STEELE, DON PETERSON, REV. DAVID MAYNARD, HARMON WRAY, REV. TOM BAKER, JR., Individually, and as State Tax Payers and as Members of Americans for Religious Liberty; and AMERICANS FOR RELIGIOUS LIBERTY a Foreign, Not-For-Profit Corporation,

Plaintiffs,

v.

THE INDUSTRIAL DEVELOPMENT BOARD OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY; THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY; DAVID LIPSCOMB UNIVERSITY; SOVRAN BANK; SOVRAN BANK/ TENNESSEE.

Defendants.

Civil No. 3:91-0421
Judge Trauger

ORDER

For the reasons express in the accompanying Memorandum, the plaintiffs' Motion for Summary Judgment (Docket No. 258) is **GRANTED**. The Motions for Summary Judgment filed by Metropolitan Government of Nashville and

Davidson County (Docket No. 189 (and by David Lipscomb University (Docket No. 193) are **DENIED**.

A permanent injunction is hereby **ISSUED**, enjoining the Industrial Development Board and Metropolitan Government of Nashville and Davidson County from issuing additional tax-exempt bonds for the benefit of David Lipscomb University or for any other pervasively sectarian institution. The plaintiffs shall be awarded $1.00 each as nominal damages and their attorney's fees pursuant to 42 U.S.C. § 1988.

Enter this 24th day of October 2000.

/s/ Aleta A. Trauger
ALETA A. TRAUGER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

HAROLD E. STEELE, DON PETERSON, REV. DAVID MAYNARD, HARMON WRAY, REV. TOM BAKER, JR., Individually, and as State Tax Payers and as Members of Americans for Religious Liberty; and AMERICANS FOR RELIGIOUS LIBERTY a Foreign, Not-For-Profit Corporation,

Plaintiffs,

v.

THE INDUSTRIAL DEVELOPMENT BOARD OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY; THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY; DAVID LIPSCOMB UNIVERSITY; SOVRAN BANK; SOVRAN BANK/ TENNESSEE.

Defendants.

Civil No. 3:91-0421
Judge Trauger

MEMORANDUM

In this proceeding to invalidate a political subdivision's bond issue to benefit a private, religious university, the principal inquiry is whether the bond issue violates the Establishment Clause of the First Amendment of the United States Constitution.

The court has before it motions for summary judgment filed by Defendant David Lipscomb University ("Lipscomb"), Defendant Metropolitan Government of Nashville ("Metro"),

and the plaintiffs. Defendant Industrial Development Board of the Metropolitan Government of Nashville and Davidson County ("Industrial Development Board" or "Board"), Defendant Sovran Bank, and Defendant Sovran Bank/Tennessee have not filed motions for summary judgment and have not responded to the plaintiff's motion for summary judgment.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

David Lipscomb University, founded in 1891, describes itself as a "liberal arts university." (Docket No. 269, para. 4) It is located in Nashville, Tennessee, and has an enrollment of approximately 2,500 students. (Docket No. 269, para. 4) It is affiliated with the Churches of Christ, and its primary mission has been to integrate Christian faith and practice with the pursuit of academic excellence. (Docket No. 269, para. 4)

During the early 1990s, Lipscomb undertook a major redevelopment project on its campus. To finance the project, Lipscomb sought a $15 million, low-interest loan from the Industrial Development Board. The Industrial Development Board approved the loan and financed it by issuing tax-exempt industrial development bonds worth $15 million.[1] The bond

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[1] There are actually two separate actions by the Board at issue in this case. The Board originally issued bonds for the benefit of Lipscomb in May 1990. (Docket No. 206, Deposition of William Hill Boner, attach. Ex. 10) The Bank with which the bonds were placed to be marketed was First American National Bank. *See id.* In January 1991, Lipscomb returned to the Board and asked for those bonds to be redeemed and for a new series of bonds to be issued and placed with Sovran Bank. (Docket No. 13, attach. Ex. 3(C)). The financial records that are available relate to these 1991 bonds, so those are the records and agreements considered by the court. With regard to the nature of Lipscomb, however, the parties have offered evidence from both time periods, school years 1989-90 and 1990-91. Whenever possible, the court has used information relating to the 1989-90

issue was also approved by Metro's Mayor Bill Boner as federally tax-exempt. The loan from the proceeds of the bonds was used in part to construct and equip a new library, to renovate and convert the old library into administrative offices, and to construct a new intramural athletics building ("or student activities center"), four new tennis courts, a new baseball stadium, an intramural field, and an addition to the school's Business Center. (Docket No. 192, Cochran Aff., para. 10)

The bonds are typical of industrial revenue bonds that are commonly issued for educational or industrial purposes. The bonds were issued by the Board pursuant to its authority under state law to issue bonds for the financing of projects for "[a]ny nonprofit educational institution in any manner related to or in furtherance of the educational purposes of such institution, including but not limited to classroom, laboratory, housing, administrative, physical education, and medical research and treatment facilities." TENN. CODE ANN. § 7-53-101(11)(A)(vii) (1990 Supp.).[2] Because the bonds were issued as education revenue bonds by the Board, the income produced by the bonds is exempt from state taxation. In addition, the bonds were approved by both the Board and Metro's Mayor under the provisions of 26 U.S.C. § 103 (1994), making the interest on the bonds federally tax exempt. Consequently, the bonds carry a lower interest rate than conventional financing, and Lipscomb realizes the benefit through the resulting lower interest rate on its loan from the Board.

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year because that is the information that was available to the Board and Metro when the original bonds were issued and any Establishment Clause issues would have been considered.

[2] Although § 7-53-101 *et seq.* has remained essentially unchanged since 1990, the code in effect in May 1990 will be used in this case because that was the date of the original issuance of the industrial development bonds.

The plaintiffs are state and local taxpayers residing in the Nashville area. They contend that the issuance of tax-exempt revenue bonds for David Lipscomb University provides an impermissible benefit to a pervasively sectarian institution, thereby violating the Establishment Clause of the First Amendment of the United States Constitution. (Docket No. 200) Such aid, they argue, has the impermissible effect of advancing religion because a substantial portion of Lipscomb's functions are subsumed in its religious mission. (Docket No. 200) Plaintiffs and/or their counsel objected to the issuance of the bonds on this basis at public hearings and meetings of the Board held on April 10, 1990, April 16, 1990,[3] May 30, 1990

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[3] At the first public hearing, plaintiff's attorney herein, Joe Johnston, and two ministers spoke against issuing the bonds to Lipscomb. Harmon L. Wray Jr. (a plaintiff herein), after identifying himself as having received a Master of Divinity degree from Duke University Divinity School and a Master of Arts in Religious Ethics from Vanderbilt University, stated, in part:

> As an active church man of another denomination, I consider my friends at David Libscomb as brothers and sisters in the Christian faith. But I do not believe that I and other taxpayers should have to subsidize the University's development through the issuance of tax-free bonds.
>
> I am convinced that a very particular version of the Christian faith pervades every aspect of institutional and campus life at Lipscomb, and it is evident that the administration, faculty, and student body are shot through with this theological perspective. There is nothing at all wrong with this, except when the general public is required to help support it through unconstitutional and unwise administrative decisions made by the government bodies such as the one here.

(Docket No. 204, Ex. 3, Public Hearing, Transcript of Proceedings, April 16, 1990, pp. 7, 9)

and January 22, 1991.[4] (Docket No. 275, para. 9) When the bonds were approved over their objection, plaintiffs filed suit in this court on May 30, 1991, as municipal taxpayers challenging the validity of the Board's action in issuing tax-exempt revenue bonds for the benefit of Lipscomb. (Docket No. 1; Docket No. 268, para. 15) Lead plaintiff Harold E. Steele died on April 1, 1998. (Docket No. 273, para. 2)

The plaintiffs were found to have standing to bring this suit as municipal taxpayers who have an interest in preventing their local government from subsidizing religious institutions. (Docket No. 83) The plaintiffs argued that the tax base of the state and local governments was reduced by the tax-exempt bonds and, therefore, tax dollars were being expended on behalf of a pervasively religious institution. They asserted that, if tax-exempt bonds had not been issued, Lipscomb would have financed all or part of the project through taxable bonds, which would have provided significant revenue for the city coffers.

Although the Board is an instrumentality of the Metropolitan Government, the bonds do not constitute an indebtedness of either the Board or the Metropolitan Government. (Docket No. 1, attach., Ex. D at 4; Docket No. 197, Cochran Aff., paras. 7-8) Neither the Board nor the Metropolitan Government can be held liable to pay any portion of the principal or interest on the bonds or any costs incident to their issuance. TENN. CODE ANN. § 7-53-306 (1985). No state or local government tax revenues have been or will be spent as a result of the issuance of the bonds. (Docket No. 197, Cochran Aff., para. 7)

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[4] The final date, January 22, 1991, relates to the special meeting considering the proposed redemption of the 1990 bonds and the issuance of the 1991 bonds. The prior hearings and meetings related to the issuance of the original bonds.

The judge originally assigned to this case found that, even if no tax money is spent, taxpayer status is proper grounds for an Establishment Clause challenge to policies that affect the city's general revenue fund. Summary judgment was denied on those grounds and, on interlocutory appeal, the Sixth Circuit Court of Appeals upheld the ruling on standing. *Steele v. Indus. Dev. Bd. of the Metro. Gov't of Nashville and Davidson County*, 39 F.3d 1182 (6th Cir.1994)(unpublished table decision), *cert. denied*, 515 U.S. 1121, 115 S.Ct. 2275, 132 L.Ed.2d 279 (1995).

Lipscomb submitted a renewed motion for summary judgment on December 15, 1995, asserting that the "tax exempt" status the bonds derived from the Board could not have harmed the plaintiffs because the bonds would not have fallen under the Hall Income Tax statute anyway. Because the bonds would mature in less than six months, the university argued, they were demand instruments, which are not taxable under the Hall Income Tax statute. The question of whether the bonds would have fallen under the Hall Income Tax statute if they had not been issued as tax-exempt bonds was certified to the Tennessee Supreme Court. The Tennessee Supreme Court ruled that, under the plain meaning of the law, bonds are not demand instruments and, therefore, are taxable. *Steele v. Indus. Dev. Bd. of the Metro. Gov't of Nashville and Davidson County*, 950 S.W.2d 345 (1997).

Lipscomb has now filed a third motion for summary judgment on the merits, alleging that its receipt of tax-exempt revenue bonds for its facilities expansion project is not a violation of the Establishment Clause, nor does it have the primary effect of advancing religion. (Docket No. 193) Metro has also moved for summary judgment on several grounds. (Docket No. 189) Oral argument was held May 10, 2000, after which the court requested that the plaintiffs submit a motion for summary judgment. The plaintiffs have moved for summary

judgment on the grounds that Lipscomb is so pervasively sectarian that a substantial portion of its function is subsumed in its religious mission. (Docket No. 258) As such, the plaintiffs assert, the $15 million in tax-exempt revenue bonds provided in this case had the impermissible effect of promoting religion as a matter of law. (Docket No. 258)

II. ANALYSIS

A. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment may be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

In order to prevail, the movant has the burden of proving the absence of a genuine issue of material fact as to an essential element of the opposing party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 202 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir.1989). In determining whether the movant has met its burden, the court must view the evidence in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). If the nonmoving party, however, fails to make a sufficient showing on an essential element of the case with respect to which the nonmoving party has the burden, the moving party is entitled to summary judgment as a matter of law. *See Williams v. Ford Motor Co.*, 187 F.3d 533, 537-38 (6th Cir.1999).

To preclude summary judgment, the nonmoving party "is required to present some significant evidence which makes it necessary to resolve the parties' differing versions of the

dispute at trial." *Gaines v. Runyon,* 107 F.3d 1171, 1174-75 (6th Cir.1997). The nonmoving party must show that "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). To determine whether the nonmoving party has raised a genuine issue of material fact, the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in its favor. *See id.,* at 255, 106 S.Ct. at 2513.

The court should also consider whether the evidence presents "a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Street,* 886 F.2d at 1479. If the evidence offered by the nonmovant is "merely colorable," "not significantly probative," or is not enough to lead a fair-minded jury to find for the nonmoving party, the motion for summary judgment should be granted. *Anderson,* 477 U.S. at 249-52, 106 S.Ct. at 2510-12.

B. The Issuance of Tax-Exempt Bonds

1. Statutory Authority and Standards for Tax-Exempt Bond Issuance

Under 26 U.S.C. § 103, gross income does not include interest on any state or local bonds that are both private activity bonds and qualified under 26 U.S.C. § 141. *See* 26 U.S.C. § 103(a)(b)(1) (1994). A private activity bond is defined, in relevant part, under 26 U.S.C. § 141 as any bond that is part of an issue which meets the "private loan financing test." 26 U.S.C. § 141(a)(2) (1994). The "private loan financing test" is met where "the amount of the proceeds of the issue which are to be used (directly or indirectly) to make or finance loans . . . to persons other than governmental units exceeds the lesser of (A) 5 percent of such proceeds, or (B) $5,000,000." 26 U.S.C. § 141(c)(1) (1994).

In order for the interest on the bonds to be exempt from federal taxation, the private activity bonds must also be qualified under 26 U.S.C. § 141(e) (1994). There are three criteria that a bond issuance must meet under this section. First, the bond must fall within one of the enumerated categories: "(A) an exempt facility bond, (B) a qualified mortgage bond, (C) a qualified veterans' mortgage bond, (D) a qualified small issue bond, (E) a qualified student loan bond, (F) a qualified redevelopment bond, or (G) a qualified 501(c)(3) bond." 26 U.S.C. § 141(e)(1) (1994). Second, the bond issue must meet the volume cap requirements of section 146.[5] 26 U.S.C. § 141(e)(2) (1994); *see also* 26 U.S.C. § 146 (1994). Finally, the bond issue must meet the requirements of each applicable subsection of section 147. 26 U.S.C. § 141(e)(3) (1994). Under the public approval requirement of section 147(f), in order to be a qualified bond a private activity bond must be approved by both the governmental unit issuing the bond and the governmental unit that has jurisdiction over the area in which the facility receiving financing through the bond proceeds is located. *See* 26 U.S.C. § 147(f)(2)(A) (1994).

A bond that meets each of these criteria will be designated as a qualified private activity bond under 26 U.S.C. § 103. Where the bonds issued are qualified private activity bonds, the interest from the bonds will be exempt from federal taxation. 26 U.S.C. § 103 (1994).

In this case, the bonds were issued for the benefit of Defendant David Lipscomb University, a private educational institution. (Docket No. 259, para. 13; Docket No. 273, para.

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[5] The volume cap requirements of section 146(a) apply to the aggregate value of private activity bonds issued by the issuer in the calendar year. *See* 26 U.S.C. § 146(a) (1994). There have been no claims that the Board exceeded its cap in issuing the bonds at issue in this case, and the court will presume it did not.

13) The proceeds of the bonds, in the amount of $15,000,000, were loaned to Lipscomb for building and renovating facilities on its campus. (Docket No. 1, para. 28; Docket No. 2, para. 28; Docket No. 3, para. 8; Docket No. 4, para. 28; Docket No. 273, para. 6) This meets the "private loan financing test" of section 141(c) because the entire amount of bond proceeds loaned to Lipscomb exceeded the statutory minimum loan amount. Therefore, the bonds may be characterized as private activity bonds under 26 U.S.C. § 141(a) (1994).

In order to be tax exempt, the bonds must also be qualified under the provisions of section 141(e). 26 U.S.C. § 103 (1994) The bond issue meets the first criteria for being a qualified private activity bond under section 141(e)(1) because the bonds are qualified 501(c)(3) bonds, which is one of the enumerated categories of bond types under this section. *See* 26 U.S.C. § 141(e)(1) (1994). A qualified 501(c)(3) bond is defined in section 145(a) as a private activity bond where "all property which is to be provided by the net proceeds of the issue is to be owned by a 501(c)(3) organization."[6] 26 U.S.C. § 145(a)(1) (1994). All of the proceeds of the $15,000,000 bond issue were loaned to Lipscomb for use in building new facilities and in renovating existing facilities. (Docket No. 191, para. 10; Docket No. 192, Cochran Aff., para. 10) Lipscomb is a registered 501(c)(3) organization. (Docket No. 13, attach. Ex. A, Tab 6) Because all of the proceeds of the bond issue were used to provide property owned by a 501(c)(3) organization, the bond issue satisfies the first requirement of section 141(e).

The final requirement of the statutory scheme for issuing federal tax-exempt bonds is that the bonds must satisfy each of

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[6] Section 145 also contains other restrictions on the bonds that have no significant bearing on this case. The only other applicable limit is the $150,000,000 limit placed on the aggregate issue, which the bond issue here does not exceed. *See* 26 U.S.C. § 145(b)(1) (1994).

the subsections of section 147. 26 U.S.C. § 141(e)(3) (1994). The only subsection applicable to the bond issue in this case is section 147(f), which provides that a private activity bond will not be a qualified bond unless it meets the subsection's public approval requirement. 26 U.S.C. § 147(f) (1994). This requirement is satisfied where the bond issue has been both (1) approved either by or on behalf of the governmental unit that issued the bonds, and (2) approved by each governmental unit that has jurisdiction over the area where any facilities which are to be financed by the bond proceeds are located. 26 U.S.C. § 147(f)(A) (1994). In each case, the approval must be given by either "the applicable elected representative of such governmental unit after a public hearing following reasonable notice" or by a voter referendum of the governmental unit. 26 U.S.C. § 147(f)(B) (1994). The elected representative may be an elected legislative body of the governmental unit, "the chief elected executive officer, the chief elected State legal officer of the executive branch, or any other elected official of such unit designated for the purposes of this paragraph by such chief elected executive officer or by State law." 26 U.S.C. § 147(f)(2)(E)(i) (1994).

The "scope" of the governmental approval is addressed in federal regulations, which state:

> An issue is treated as approved if the governmental units . . . have approved either -
>
> (i) The issue . . . not more than one year before the date of issue, or
>
> (ii) A plan of financing for each facility financed by the issue pursuant to which the issue in question is timely issued (as required in paragraph (f)(3) of this section).

In either case, the scope of the approval is determined by the information, as specified in paragraph (f)(2), contained in the notice of hearing . . . and the approval.

(2) Information required. A facility is within the scope of an approval if the notice of hearing . . . and the approval contain -

(i) A general, functional description of the type and use of the facility to be financed . . .

(ii) The maximum aggregate face amount of obligations to be issued with respect to the facility,

(iii) The initial owner, operator, or manager of the facility,

(iv) The prospective location of the facility by its street address or, if none, by a general description designed to inform readers of its specific location.

. . . An approval or notice of public hearing will not be considered to be adequate if any of the items in subdivisions (i) through (iv) of this subparagraph (2), with respect to the facility to be financed, are unknown on the date of the approval or the date of the public notice.

26 C.F.R. § 5f.103-2(f) (1999).

In this case, the bond issue was approved by the Industrial Development Board as the governmental unit that issued the bonds and by Mayor Bill Boner as the chief elected executive officer of Metropolitan Government of Nashville and Davidson County, the governmental unit in which the facilities of David Lipscomb University are located. (Docket No. 191, paras. 14-17; Docket No. 201, paras. 14-17) There were two public hearings on the bond issue prior to the final issuance by the

Board and approval by the mayor on May 30, 1990, and the plaintiffs do not allege that there was either inadequate notice of those hearings or inadequate information in the notices or approvals. (Docket No. 259, paras. 9, 12, 13; Docket No. 273, paras. 9, 13)

The technical statutory requirements for creating federally tax-exempt bonds are clear, but there is little guidance on the standard to be used by the governmental units deciding whether to grant public approval. The Board has offered no information on this question and has not responded to the plaintiffs' Motion for Summary Judgment. Metro has offered a variously-worded standard, which states, in essence, that the bond issue must be for a legitimate public purpose and/or must create a substantial public benefit. (Docket No. 190 at 9, 11-16, 28-29; Docket No. 191, paras. 19-21, 23- 24; Docket No. 273, para. 5; Docket No. 286 at 6-9) According to its briefs, Metro has taken this language from the Tennessee statutory definition of "public purpose," TENN. CODE ANN. 7-53-102(a) (1985), and from the Report of the Senate Finance Committee in recommending the public notice and approval requirements. *See* S. Rep. No. 494(I), 97th Cong., 2nd Sess.1982, 1982 U.S.C.C.A.N. 781; Docket No. 190 at 15-16; Docket No. 286 at 7-9.

The court can find no standard for the public approval in the statutory scheme regarding the issuance of federal tax-exempt bonds. In the Committee Report referenced by Metro, the Senate Finance Committee explains its reasoning in recommending the public approval requirement, specifically in relation to industrial development bonds:

> The committee believes that new restrictions are needed on IDBs to help eliminate inappropriate uses and to help restore the benefit of tax-exempt financing for traditional governmental purposes. However, the committee believes that, in general, state and local

governments are best suited to determine the appropriate uses of IDBs. The committee believes that providing tax exemptions for the interest on certain IDBs may serve legitimate purposes in some instances ***provided that the elected representatives of the state or local governmental unit determine after public input that there will be substantial public benefit from issuance of the obligations*** and provided that the affected public has had an opportunity to comment on the use of tax-exempt financing for particular facilities. In order to achieve this goal, the committee bill requires notice and a public hearing and approval by an elected representative of the issuer before issuance of any IDBs.

S.Rep. No. 494(I), 97th Cong., 2nd Sess.1982, 1982 U.S.C.C.A.N. 781, 930 (emphasis added). This legislative history comports with a reasonable interpretation of the statute requiring public approval, and Metro seems to have adopted this standard willingly. (Docket No. 190 at 9-16; Docket No. 273, para. 5; Docket No. 286 at 8-9) Therefore, this court finds that in determining whether to grant approval to the bonds as federally tax-exempt under 26 U.S.C. § 147(f), the Industrial Development Board and Mayor Bill Boner were each required to determine that the issuance of the bonds would serve a legitimate public purpose and/or create a substantial public benefit.

2. Board's Role in the Issuance of Tax-Exempt Bonds

Under Tennessee law, a development board may be incorporated when at least three taxpayers make written application to a municipality and the municipal government determines:

> that it is wise, expedient, necessary or advisable that the corporation be formed and shall authorize the

> persons making such application to proceed to form such corporation and shall approve the form of certificate of incorporation proposed to be used in organizing the corporation, then the persons making such application shall execute, acknowledge and file a certificate of incorporation for the corporation as hereinafter provided. No corporation may be formed unless such application shall have first been filed with the governing body of the municipality and the governing body shall have adopted a resolution as provided in this section.

TENN. CODE ANN. § 7-53-201 (1985). In this case, Metro approved creation of the corporation by resolution as the statute required.

The approved incorporation papers must then be filed with the Secretary of State's office. Once the incorporation has been approved, the development board can only amend its incorporation papers if the governing body (here Metropolitan Government) determines that it is "wise, expedient, necessary or advisable that the proposed amendment be made." TENN. CODE ANN. § 7-53-204 (1985).

Industrial development boards have considerable statutory powers, including authority to enter loan agreements with private third parties, sue and be sued, sell any or all of their properties, including the rents, revenues and receipts of the board, issue bonds, and borrow money from banks or other financial institutions by issuing notes. TENN. CODE ANN. § 7-53-302 (1990 Supp.).

Among these statutory powers, the industrial development board is empowered to approve tax-exempt bonds for various public works and projects, including "[a]ny nonprofit educational institution in any manner related to or in furtherance of the educational purposes of such institution,

including, but not limited to classroom, laboratory, housing, administrative, physical education, and medical research and treatment facilities." TENN. CODE ANN. § 7-53-101(11)(A)(vii) (1990 Supp.). After approval and sale of the bonds, municipal governments that approve them are not liable for repayment of the debt. TENN. CODE ANN. § 7-53-306 (1985).

The Board issued the industrial development bonds benefitting David Lipscomb University pursuant to this state authority.[7] In addition, the Board approved the bonds to be federally tax-exempt (Docket No. 3, para. 8) as established under the provisions of 26 U.S.C. § 103 (1994). The Board held two public hearings prior to issuing final approval of the bond issue, although the Board members were only present for the second of these hearings. (Docket No. 1, attach. Exs. F-G) In approving the bond issue as tax exempt, the Board had to find that the bond issue served a legitimate public purpose and/or created a substantial public benefit. There cannot be a legitimate public purpose that violates the United States Constitution. In approving the bond issue as serving a legitimate public purpose, therefore, the Board was necessarily required to determine that the issue would not conflict with the Establishment Clause of the First Amendment.

3. Metro's Role in the Issuance of Tax-Exempt Bonds

Metro contends that summary judgment should be granted in its favor because it cannot be held liable for the Industrial Development Board's issuance of tax-exempt revenue bonds. (Docket No. 189) Metro contends that the statutes and

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[7] Because the Industrial Development Board has failed to respond to the plaintiffs' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment, pursuant to Local Rule 8(b)(7), the court will take the sixty (60) facts asserted therein as undisputed by the Board. *See Grimes v. Superior Home Health Care of Middle Tenn., Inc.*, 929 F.Supp. 1088, 1096 (M.D.Tenn.1996).

regulations incorporating and empowering the Board provide a shield, protecting the Metropolitan Government from liability in the issuance of the bonds because plaintiffs can sue directly the Industrial Development Board, the entity that issued the bonds. But this fact does not insulate Metro from its own responsibility in the approval of the bonds. Without Metro's approval, the bonds could not have been issued as federally tax-exempt.

In granting approval, the mayor is required under § 147(f) to ascertain whether the issuance of the bond in question serves a legitimate public purpose and/or creates a substantial public benefit. Metro argues that the mayor's inquiry is limited to determining whether the bond issue contains the four pieces of "information required" under the federal regulations interpreting the public approval requirement, 26 C.F.R. § 5f.103-2(f) (1999). (Docket No. 190 at 11) This argument is based on a misreading of the regulation, which clearly states that these four pieces of information determine the "scope of the approval" and the adequacy of the approval and public notice. *See* 26 C.F.R. § 5f.103-2f(1)-(2) (1999). In other words, no public notice or approval will be valid if all of this information is not spelled out and made public. The regulation cannot be read to limit Metro's consideration to these four things and foreclose it from constitutional considerations. And Metro concedes in its papers that its "actions are limited by the United States Constitution . . .". (Docket No. 273, para. 5) Metro's interpretation would make Metro an instrumentality of the Industrial Development Board when, in fact, the opposite is true. "The corporation is hereby declared to be performing a public function in behalf of the municipality with respect to which the corporation is organized and to be a public

instrumentality of such municipality." [8] TENN. CODE ANN. § 7-53-305(a) (1990 Supp.); Docket No. 1, attach., Ex. D at 4; *see also* Docket No. 192, Cochran Aff., para. 8. The Court finds that the Industrial Development Board is an instrumentality of Metro.

This court has accepted the standard put forth by Metro that, in order to grant approval of the bonds as federally tax-exempt, the mayor must determine that the bond issue serves a legitimate public purpose and/or creates a substantial public benefit. The mayor was at least generally aware of this standard when he approved the bond issue, as indicated in a letter to the Board written by the mayor before he granted approval. (Docket No. 206, Deposition of William Hill Boner, Ex. 3; Docket No. 273, para. 5) In requesting that the Board hold a second public hearing and review the bond issue it had previously approved, the mayor stated,

> I am advised that the purpose of the public hearing and approval requirement is to allow for more informed decisions by the local government unit as to the public benefit to be derived from the issuance of the obligations as well as to provide the affected public with a reasonable opportunity to comment on the use of tax-exempt financing for particular facilities. These considerations are relevant not only

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[8] As outlined in the previous section, Tennessee law required Metro to approve the incorporation of the Industrial Development Board. The Board cannot amend its incorporation papers without the consent of Metro. The Board described itself as an instrumentality of Metro in the Official Statement accompanying the bond re-issue in 1991. (Docket No. 1, attach., Ex.D at 4) This description was prepared by the Board, approved by the Board, and signed by the Chairman of the Board. *Id.* at 36-37. In addition, section 7-53-305(a) states: "bonds issued by the corporation shall be deemed to be securities issues by a public instrumentality or a political subdivision of the state of Tennessee." TENN. CODE ANN. § 7-53-305(a) (1990 Supp.).

> for my review but also to the Board as it exercises its statutory responsibilities.

(Docket No. 206, Deposition of William Hill Boner, Ex. 3)

Although Metro and the mayor seem to have been aware of the standard for public approval of the bond issue, there is little evidence in the record of efforts made by the mayor to determine whether the bond issue in question met that standard. In his deposition, Mayor Boner admitted that he did not review the administrative record of any of the public hearings concerning the bond issue. (Docket No. 206 at 33-34, 59) Mayor Boner has no recollection of reading or considering a number of letters sent to his office highlighting concerns about possible conflicts with the First Amendment in issuing tax-exempt bonds to assist a private, religious institution. *Id.* at 34-38, 59. Mayor Boner also admitted that he did not personally review any of the issues or documents relating to this determination or to the question of whether the bond issue would violate the Establishment Clause of the First Amendment. (Docket No. 206, Deposition of William Hill Boner, at 59-60) Instead, the mayor stated repeatedly that he relied entirely on the Metropolitan Legal Department's recommendation regarding his responsibilities in the approval of the bond issue. *Id.* at 33, 38, 45-47. Metro has admitted, however, that the Mayor did not consult with the Legal Department on any Establishment Clause issues during the period he was considering the bond issue in this case. (Docket No. 273, para. 36; Docket No. 206, Deposition of William Hill Boner, at 12)

With regard to the religious nature and characteristics of David Lipscomb University, Metro has admitted that the mayor did not investigate the degree of affiliation between the institution and the Churches of Christ. (Docket No. 273, para. 38; *see also* Docket No. 206, Deposition of William Hill

Boner, at 14) Mayor Boner also did not read the corporate charter of Lipscomb (Docket No. 273, para. 39; *see also* Docket No. 206, Deposition of William Hill Boner, at 14), and the mayor was unaware of the stated purpose of the university, as contained in that charter, when he granted approval to the bond issue to be tax exempt. (Docket No. 273, para. 40; *see also* Docket No. 206, Deposition of William Hill Boner, at 4) Mayor Boner did not review any Lipscomb publications outlining the goals and objectives of the university. (Docket No. 273, para. 42; *see also* Docket No. 206, Deposition of William Hill Boner, at 15) Finally, the mayor was unaware of restrictive covenants on the property owned by Lipscomb and of the mandatory attendance requirements for Lipscomb students in Bible classes and at chapel services. (Docket No. 273, paras. 41, 43-44; *see also* Docket No. 206, Deposition of William Hill Boner, at 15)

The court is not directly considering the duty of care owed by the mayor in investigating and approving the bond issue in this case, but the court is concerned with whether the bond issue violated the Establishment Clause of the First Amendment. In granting approval for the bonds to be federally tax- exempt, the mayor was required to determine that the bond issue served a legitimate public purpose and/or created a substantial public benefit. A bond issue that infringes upon the Establishment Clause cannot meet this standard.

Without the mayor's approval of the bond issue as meeting the federal requirements, the bonds could not have been issued as federally tax-exempt and no suit would be before this court. Therefore, because of the significant role that the Metropolitan Government plays in this process, both through the action of its mayor and by virtue of the fact that the Board is an instrumentality of Metro, defendant Metro's position that the issuance of tax-exempt revenue bonds to Lipscomb was an act

solely attributable to the Industrial Development Board is untenable.

Summary judgment on this ground will be denied to Metropolitan Government.

C. Establishment Clause

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ." U.S. CONST. amend. I. From the earliest consideration of Establishment Clause challenges, courts have found it easier to identify the lofty goals of the First Amendment than to apply it in these cases. In the more than fifty years since the Supreme Court found the Establishment Clause applicable to the states in *Everson v. Board of Ed. of the Township of Ewing*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), the Court has continued to struggle in defining the limits of state action under the Establishment Clause and in creating guidelines for the states and the courts to follow:

> It is easy enough to quote the few words comprising that clause–'Congress shall make no law respecting an establishment of religion.' It is not at all easy, however, to apply this Court's various decisions construing the Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools. Indeed, in many of these decisions, "we have expressly or implicitly acknowledged that 'we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.'"

Mueller v. Allen, 463 U.S. 388, 392-93, 103 S.Ct. 3062, 3065-66, 77 L.Ed.2d 721 (1983) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 609, 612, 91 S.Ct. 2105, 2109, 2111, 29 L.Ed.2d 745 (1971), *quoted with approval in Committee for Public Educ.*

and Religious Liberty v. Nyquist, 413 U.S. 756, 761, 93 S.Ct. 2955, 2959, 37 L.Ed.2d 948 (1973)).

In *Lemon v. Kurtzman,* the Court recognized "the three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity." 403 U.S. at 612, 91 S.Ct. at 2111 (internal citations and quotation marks omitted). The Court then articulated its now-familiar three-pronged test for affording this protection. First, the statute must have a secular, legislative purpose. Second, its principal or primary effect must be one that neither advances nor inhibits religion. Finally, the statute must not foster an excessive government entanglement with religion. *Id.,* at 612-13, 91 S.Ct. at 2111. In *Agostini v. Felton,* the Court found that the entanglement prong, while still important, has essentially evolved into a consideration within the primary effect prong of the test. 521 U.S. 203, 232-33, 117 S.Ct. 1997, 2015, 138 L.Ed.2d 391 (1997). As a result, the analysis of the "effects" prong of the *Lemon* test consists of three primary considerations: (1) whether the statute results in government indoctrination; (2) whether the statute defines its recipients by reference to religion; and (3) whether the statute creates an excessive entanglement. *See id.,* at 234, 117 S.Ct. 1997, 117 S.Ct. at 2016. Within that framework, the Court has reiterated that the analysis of excessive entanglement involves the same factors as when it was a separate consideration: (1) the character and purposes of the institution benefitted; (2) the nature of the aid the state provides; and (3) the resulting relationship between government and religious authority. *Id.,* at 232, 117 S.Ct. at 2015.

The plaintiffs challenge the issuance of tax-exempt bonds to David Lipscomb University on the grounds that it is an action by the Industrial Development Board and by the Metropolitan Government of Nashville and Davidson County

in violation of the Establishment Clause of the First Amendment. The plaintiffs assert that they are entitled to summary judgment because, as a matter of law, Lipscomb is so pervasively sectarian that the substantial tax benefit conferred directly on the school, in effect, was state sponsorship of the school's Christian indoctrination.

The defendants assert that the plaintiffs' motion for summary judgment should be denied and the defendants' motions granted because the Supreme Court's recent decision, *Mitchell v. Helms*, ___ U.S. ___, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000), affirms the defendants' position that, because the tax benefit to Lipscomb promotes a legitimate, secular, legislative purpose, there is no First Amendment violation. In addition, Lipscomb asserts that, under *Mitchell*, the pervasively sectarian test is no longer viable and, even if it were, the benefit conferred upon Lipscomb is merely a tax exemption that has long been an acceptable indirect benefit to religious institutions.

The parties in this case agree that the statute has a secular purpose as written. Therefore, the court need consider only whether the governmental aid in this case has the primary effect of fostering or promoting religion. To determine whether the tax-exempt bonds have such an effect, the court must determine whether this aid (1) results in governmental indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement. *Agostini*, 521 U.S. at 234, 117 S.Ct. at 2016.

1. Possible Lines of Analysis under Establishment Clause Precedent

While the statute authorizing the tax-exempt bond issue does not identify the recipients by reference to religion, Metro's authorization of the bond issue fails the other two criteria used to determine whether the government benefit advances religion:

it results in governmental indoctrination and creates an excessive entanglement. In making this determination, the court relies on three separate lines of analysis provided by the Supreme Court and other lower courts to determine whether government aid to a religious institution violates the Establishment Clause.[9] Because the Court has repeatedly noted the difficulty in evaluating individual cases under the Establishment Clause, this court will examine the facts of this case under each of these three approaches.

The first approach relies on the line of cases considering state aid directly given to colleges and universities, as discussed primarily in *Tilton v. Richardson,* 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971), *Hunt v. McNair,* 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973), and *Roemer v. Board of Publ. Works of Maryland,* 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976). This line of cases provides the most directly controlling precedent to the case at hand, establishing that a government may not provide financial aid to a pervasively sectarian institution. All three cases confront financial assistance provided to colleges and universities by the states in the form of grants or the proceeds of revenue bonds. These facts parallel the case before the court, and the decisions in these cases provide the best framework for analyzing the constitutionality of the tax-exempt bonds issued for the benefit of Lipscomb.

Although the above cases provide the most directly-applicable analysis of the instant case, they do not represent the most recent decisions by the Court concerning government aid in various forms to religious schools and institutions. The more

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[9] The plaintiffs base their arguments on only one line of cases, those prohibiting government aid from being given to pervasively sectarian institutions. As explained, however, the court has determined that a thorough evaluation of this case requires going beyond this single approach.

recent cases, including *Agostini, Mitchell v. Helms*, ___ U.S. ___, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000), and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), cover a variety of aid programs and schools. They provide a different framework of analysis for the Lipscomb bond issue, focusing on specific details of the aid program, such as the neutrality of the program, the role of private individuals in determining the recipients of the aid, and the safeguards implemented to ensure that the aid will support only the secular functions of the religious institutions. These cases are not all factually similar to the instant case, but they provide additional guidance for evaluating the assistance given to Lipscomb as a result of the tax-free bond issue.

Finally, many of the Court's decisions involve, at least in part, a consideration of whether the government action would be interpreted by a reasonable observer as an endorsement of religion. *See, e.g., Rosenberger*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). As Justice Brennan explained for the plurality in *Texas Monthly, Inc. v. Bullock*,

> In proscribing all laws 'respecting an establishment of religion,' the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally. It is part of our settled jurisprudence that 'the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or to favor the adherents of any sect or religious organization.'

489 U.S. 1, 8-9, 109 S.Ct. 890, 896, 103 L.Ed.2d 1 (1989) (plurality opinion) (quoting *Gillette v. United States,* 401 U.S. 437, 450, 91 S.Ct. 828, 836, 28 L.Ed.2d 168 (1971)). According to this approach, if the government action would be considered an endorsement of religion by a reasonable observer, then the action has the impermissible effect of advancing religion in violation of the Establishment Clause. Thus, the endorsement test provides a third analytical tool for evaluating the bond issue in this case.

Each of the above tests is simply a framework for evaluating whether a specific government action is in violation of the Establishment Clause because it has the primary effect of advancing or inhibiting religion. An analysis of this case under each of these lines of cases draws a better picture of the government's actions in relation to what the Court has found to be permissible and impermissible under the Establishment Clause.

2. Pervasively Sectarian Test

In *Tilton v. Richardson,* 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971), which was issued the same day as *Lemon,* the Court stated that the "crucial question" concerning government aid to religiously affiliated schools "is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." 403 U.S. at 679, 91 S.Ct. at 2096. The Court recognized the possibility that there could be cases in which "religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable." *Id.,* at 680, 91 S.Ct. at 2097. These "pervasively sectarian" institutions cannot receive government financial assistance without the impermissible effect of advancing the religious beliefs of the institutions. *See Roemer,* 426 U.S. at 755, 96

S.Ct. at 2349. The plaintiffs rely on this theory and claim that providing aid to David Lipscomb University violated the Establishment Clause because Lipscomb "is so pervasively sectarian that a substantial portion of its function is subsumed in its religious mission." (Docket No. 258, para. 3).

a. Mitchell v. Helms and the Status of the Pervasively Sectarian Test

As an initial matter, the defendants have questioned whether this line of cases is an appropriate basis for considering the Lipscomb bond issue. The defendants have argued that the "pervasively sectarian" test is no longer valid under Establishment Clause jurisprudence, thus, the court should not evaluate the Lipscomb bond issue under that approach. The defendants rely on the plurality opinion of Justice Thomas in *Mitchell v. Helms* for this proposition. *See Mitchell*, ___ U.S. ____, 120 S.Ct. 2530, 2550-52, 147 L.Ed.2d 660 (2000) (plurality opinion).

The defendants are correct that the plurality opinion in *Mitchell* indicates that the "pervasively sectarian" test should no longer be used in evaluating Establishment Clause claims. Justice Thomas states that "there was a period when this factor mattered, particularly if the pervasively sectarian school was a primary or secondary school. . . . But that period is one that the Court should regret, and it is thankfully long past." *Id.*, __ U.S. at __, 120 S.Ct. at 2550. Justice Thomas finds that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now." *Id.*, ___ U.S. at ___, 120 S.Ct. at 2552.

Mitchell, like many of the Court's recent Establishment Clause cases, is a plurality opinion. Justice Thomas wrote the plurality opinion, and it was joined by Chief Justice Rehnquist

and by Justices Scalia and Kennedy. *See id.*, ___ U.S. at ___, 120 S.Ct. at 2536. Justice O'Connor wrote an opinion, concurring in the judgment only, in which Justice Breyer joined. *See id.*, ___ U.S. at ___, 120 S.Ct. at 2556. Neither Justice O'Connor nor Justice Breyer joined in any portions of the plurality opinion written by Justice Thomas. It is well settled that in a plurality opinion, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Coe v. Bell*, 161 F.3d 320, 354 (6th Cir.1998)(quoting *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)); *see also, Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764, fn. 9, 108 S.Ct. 2138, 2148, 100 L.Ed.2d 771 (1988); *Reese v. City of Columbus*, 71 F.3d 619, 625 (6th Cir.1995). In *Mitchell*, there is no single part of any opinion that commands the support of a majority of the Court. As a result, the only binding precedent of *Mitchell* is the holding. *See* Igor Kirman, Note, *Standing Apart to be A Part: The Precendential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2084-85 (1995); Ken Kimura, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1596-98 (1992).

This court will not abandon a recognized and applicable test under Establishment Clause jurisprudence unless and until the Supreme Court has clearly determined that it is no longer a valid approach. In fact, Justice Thomas supported this position in *Mitchell* and cited the admonition of the Court from *Agostini v. Felton:*

> We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the

> Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'

Agostini, 521 U.S. 203, 237, 117 S.Ct. 1997, 2017, 138 L.Ed.2d 391 (1997) (quoting *Rodriguez de Quizas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989)), *cited in Mitchell v. Helms*, ___ U.S. at ___, 120 S.Ct. at 2539 (plurality opinion)). The cases establishing that government financial aid may not be provided to pervasively sectarian universities are the most directly applicable precedent for deciding the case at hand. The Supreme Court has not overruled these cases. Therefore, this court will examine the Lipscomb bond issue under this approach to determine whether the aid provided to Lipscomb had the effect of advancing religion in violation of the Establishment Clause.

b. Development of the Pervasively Sectarian Test

The pervasively sectarian test is based on the line of cases beginning with *Tilton* and extending through *Bowen v. Kendrick*, 487 U.S. 589, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988). In *Hunt v. McNair*, the Court found that "[a]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." 413 U.S. 734, 743, 93 S.Ct. 2868, 2874, 37 L.Ed.2d 923 (1973). Thus, the rule under the pervasively sectarian test, as stated in *Roemer v. Board of Publ. Works of Maryland*, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976), is that "no state aid at all go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones . . . ." 426 U.S. at 755, 96 S.Ct. at 2349.

In *Tilton*, the Supreme Court considered a federal program offering construction grants for schools and colleges under Title I of the Higher Education Facilities Act of 1963. *See* 403 U.S. at 674, 91 S.Ct. at 2094. In general, the Court found that the aid program was carefully administered to make sure that the funds did not go to pervasively sectarian colleges: some colleges were declared ineligible to receive funds, and those religiously affiliated schools that did receive funds were not so sectarian that religion permeated their teachings. *See id.*, at 679-80, 682, 91 S.Ct. at 2096, 2097. Thus, the Court refused to strike down a direct federal grant to four Roman Catholic colleges and universities in Connecticut because none of the four colleges was pervasively sectarian.[10] *Id.*, at 682, 91 S.Ct. at 2097.

The Court in *Tilton* observed that none of these church-related colleges compelled attendance at religious services and that the colleges subscribed to a set of well-established principles of academic freedom. *Id.*, at 686-87, 91 S.Ct. at 2099-2100. Moreover, the evidence showed that non-Catholics were admitted as students and given faculty appointments, and the courses taught at the colleges covered a range of human religious experiences and thus were not limited to instruction from a Roman Catholic perspective. *Id.* The Court found that these schools, although affiliated with a religion, were "characterized by an atmosphere of academic freedom rather than religious indoctrination." *Id.*, at 681, 91 S.Ct. at 2097. These facts led the Court to conclude that the institutions could

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[10] The four Roman Catholic institutions receiving federal aid were Sacred Heart University, Annhurst College, Fairfield University and Albertus Magnus College. Federal funds were used for five projects at these four institutions: (1) a library building at Sacred Heart; (2) a music, drama, and arts building at Annhurst; (3) a science building at Fairfield; (4) a library building at Fairfield; and (5) a language laboratory at Albertus Magnus. *Tilton*, 403 U.S. at 676, 91 S.Ct. at 2094.

receive federal aid without having the effect of advancing religion. At the same time, Chief Justice Burger's majority opinion held open the likelihood that if pervasively sectarian schools had received the funds, the statute might have been invalid as applied. *See id.*, at 682, 91 S.Ct. at 2097-98. ("Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics.").

Two years after *Tilton*, the Court considered another aid program benefitting religious schools. In *Hunt v. McNair*, the Court upheld a decision to issue tax-free revenue bonds--substantially similar to those issued in this case--for the benefit of Baptist College at Charleston, South Carolina. *See id.*, at 736-37, 93 S.Ct. at 2870-71. The Court found very little evidence that the college was pervasively sectarian, even though it was governed by the South Carolina Baptist Convention. *Id.*, at 743, 93 S.Ct. at 2874. About 60 percent of the student body was Baptist, but the Court found that this percentage was equivalent to the percentage of Baptists in the area where the school was located. *Id.*, at 744, 93 S.Ct. at 2874. Further, the school had no religious qualifications for faculty membership or student admittance. *Id.*, at 743-44, 93 S.Ct. at 2874. From the facts, the Court concluded that Baptist College was not pervasively sectarian and, thus, could receive the benefit of the bond issue. *Id.*, at 743, 93 S.Ct. at 2874. Like *Tilton*, however, the Court found that if the state aid had gone to pervasively sectarian colleges, the outcome would have been different. *See id.*

In *Roemer v. Bd. of Public Works of Maryland*, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976), the Court again considered the application of a statute that provided for state grants to private colleges, including church-related colleges. The Court found that several church-related colleges in

Maryland that had received state grants were not pervasively sectarian. These colleges were affiliated with the Roman Catholic Church, but they neither received funds from, nor made reports to, the Catholic Church. 426 U.S. at 755, 96 S.Ct. at 2349. The schools employed Roman Catholic chaplains and religious exercises were held on campus, but neither students nor instructors were required to attend. *Id.* Spiritual development was encouraged, but "at none of these institutions does this encouragement go beyond providing the opportunities or occasions for religious experience." *Id.* Some mandatory religion or theology courses were taught, but the district court had required the Council for Higher Education, the organization overseeing the grants, to "take [additional] steps to ensure that no public funds would be used to support religious and theological programs." *Id.*, at 756 n. 20, 96 S.Ct. at 2349 n. 20. The district court also found that nontheology courses were "taught in an atmosphere of intellectual freedom." *Id.*, at 756, 96 S.Ct. at 2349 (internal quotation marks omitted). All of the colleges subscribed to and abided by the Statement of Principles on Academic Freedom of the American Association of University Professors. *Id.* Some of the classes started with prayer, but there was no policy requiring professors to do so. *Id.* For nontheology departments, faculty hiring decisions were not based upon religion. *Id.*, at 757, 96 S.Ct. at 2350. Under such conditions, the Court stated, "there was little risk that religion would seep into the teaching of secular subjects, and the state surveillance necessary to separate the two, therefore, was diminished." *Id.* As a result, the Court found that these schools were not so pervasively sectarian that state aid limited to secular interests would advance religion.

Finally, in *Bowen v. Kendrick*, the Court held that federal legislation providing grants to pregnancy prevention programs did not violate the First Amendment on its face, although some of the funds went to religious programs. 487 U.S. 589, 617-18,

108 S.Ct. 2562, 2578-79, 101 L.Ed.2d 520 (1988). It would be improper, the Court stated, to assume that all such programs were pervasively sectarian. *Id.*, at 611, 108 S.Ct. at 2575. The court remanded the case to determine whether the statute was unconstitutional as applied, implying that some benefits provided to a pervasively sectarian program may be violative of the First Amendment. *Id.*, at 620-22, 108 S.Ct. at 2580-81.

Although the circuit courts have applied the Supreme Court's pervasively sectarian test to Establishment Clause cases, only the Fourth Circuit has attempted to set out the characteristics of a pervasively sectarian college under the guidelines of *Hunt, Tilton* and *Roemer*. *Columbia Union College v. Clarke*[11], 159 F.3d 151, 163 (4th Cir.1998). In *Columbia Union,* the court identified four "general areas of inquiry" when evaluating whether a school is pervasively sectarian: "(1) does the college mandate religious worship, (2) to what extent do religious influences dominate the academic curriculum, (3) how much do religious preferences shape the college's faculty hiring and student admission

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[11] The Fourth Circuit overturned a lower court ruling that granted summary judgment in favor of Maryland officials who denied a grant to a four-year college affiliated with the Seventh Day Adventist Church. The Fourth Circuit found that, because the lower court in that case viewed ambiguous facts in a light least favorable to the non-moving party, there was a factual question as to whether the college was pervasively sectarian. It remanded the case for further proceedings to determine whether it was a pervasively sectarian institution and reiterated the lower court's finding that, if it was found to be pervasively sectarian, it would be ineligible for the funds. *Columbia Union College,* 159 F.3d at 164. The case was appealed to the Supreme Court, which denied *certiorari.* But in a precursor to his plurality opinion in *Mitchell,* Justice Thomas dissented from the denial of *certiorari,* stating, "We should take this opportunity to scrap the 'pervasively sectarian' test and reaffirm that the Constitution requires, at a minimum, neutrality not hostility toward religion." *Columbia Union College v. Clark,* ___ U.S. ___, 119 S.Ct. 2357, 144 L.Ed.2d 252 (1999).

processes, and (4) to what degree does the college enjoy 'institutional autonomy' apart from the church with which it is affiliated." *Id.* According to *Columbia Union,* evidence of the existence of a single factor would not be dispositive, and to find a school pervasively sectarian,

> the college must in fact possess a great many of the following characteristics: mandatory student worship services; an express preference in hiring and admissions for members of the affiliated church for the purpose of deepening the religious experience or furthering religious indoctrination; academic courses implemented with the primary goal of religious indoctrination; and church dominance over college affairs as illustrated by its control over the board of trustees and financial expenditures.

Id.

Under this line of analysis, the court must determine whether Lipscomb is so pervasively sectarian that the tax-exempt bond issue had the primary effect of promoting religion. To make this determination, "it is necessary to paint a general picture of the institution, composed of many elements." *Roemer,* 426 U.S. at 758, 96 S.Ct. at 2350. The court must consider the character and purposes of Lipscomb, the nature of the tax-exempt bonds, the relationship between Metro and the Churches of Christ, and the message that was delivered when tax-exempt bonds were used to improve Lipscomb's facilities. In doing so, the court will consider the following "pervasively sectarian factors" suggested by the plaintiffs and culled from the relevant case law:

1. Whether the school adheres to the American Association of University Professors ("AAUP") Statement of Principles on Academic Freedom.

2. Whether the school is sponsored by a religious organization or church.

3. Whether the school teaches religious doctrine in its programs.

4. Whether institutional documents state religious restrictions on what can be taught.

5. Whether the board of trustees is elected by the church.

6. Whether the church approves certain financial transactions.

7. Whether a majority of students--or a percentage greater than the population in that area--are members of the church.

8. Whether religion or theology classes are required.

9. Whether classes begin with prayer.

10. Whether admissions are restricted based upon the applicant's religion.

11. Whether attendance is required at religious activities.

12. Whether obedience to the doctrine and dogmas of the faith are compelled.

13. Whether the school takes other actions to attempt to propagate a particular religion.

c. Application of Pervasively Sectarian Test to Lipscomb

In this case, evidence of the pervasively sectarian nature of Lipscomb is much stronger than that presented in *Hunt, Tilton,*

Roemer or even *Columbia Union College*,[12] and nearly all of these factors militate toward finding Lipscomb to be a pervasively sectarian institution.

The land on which the construction projects funded by the bond proceeds were undertaken is subject to restrictive covenants that require that the property be used exclusively to further the religious mission of the institution so long as the property is owned by Lipscomb. (Docket No. 268, para. 6)

The following policies are included in Lipscomb's corporate charter and bylaws of the Board of Directors:

> 1. The corporation was organized *for the purpose of teaching the word of God* and the various branches of useful knowledge, commonly taught in institutions of learning for the following general purpose: the support of any literary or scientific undertaking as a college or university with the power to confer degrees of academy, a debating team lyceum, the establishment of a library, the support of a historical society, the promotion of painting, music and the fine arts, the support of the Board of Trade or Chamber of Commerce or other objects of like nature, *the support of public worship, the building of churches and chapels and the maintenance of missionary undertakings.*

(Docket No. 268, para. 56(a))(emphasis added)

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[12] Unlike the district court in *Columbia Union College*, this court is considering only facts that the defendants do not dispute and viewing them in a light most favorable to the non-moving party.

2. Each director must be a member of the Church of Christ in good standing in the congregation of which he or she is a member.

(Docket No. 268, para. 56(b)(1))

3. The president of David Lipscomb University is its chief executive officer with the general supervision of its business and Christian educational affairs. He has three principal duties: Christian education, public relations and financial.

(Docket No. 268, para. 56(b)(3))

4. The president, with the assistance of vice presidents and the principals *shall maintain a Christian college that shall perpetuate the high Christian ideals* as inaugurated by Harding and Lipscomb, the founders of David Lipscomb College *in which the Bible is made the book of most importance,* and shall maintain as nearly as possible such educational standards as may be adopted by the State of Tennessee, and of such accrediting agencies as may exist in the area in which David Lipscomb College is located.

(Docket No. 268, para. 56(b)(4))(emphasis added)

5. [The President] shall teach or cause to be taught Bible every school day to every student enrolled. The Bible shall be taught by teachers who are sound in the faith and faithful in their lives to its sacred truths.

(Docket No. 268, para. 56(b)(5))

6. The Vice President for Institutional Planning shall organize and direct a program of public

> relations aimed in particular in obtaining the good will and support of Churches of Christ, alumni and the general community.

(Docket No. 268, para. 56(b)(7))

> 7. All personnel of David Lipscomb College, other than through its services and buildings and grounds [departments], shall be members in good standing of the Churches of Christ.

(Docket No. 268, para. 56(b)(8))

Lipscomb admits that the school does not adhere to the AAUP Statement of Principles on Academic Freedom.[13] (Docket No. 268, para. 60) The Faculty Handbook states:

> Each member of the Lipscomb faculty is committed both by personal conviction and by contract to the purposes and ideals of the institution as set forth by the founders and Board of Directors. *Within this framework* each teacher is free to pursue and teach truth in his/her respective field of learning. *Since truth is consistent everywhere,* this basic commitment makes possible academic freedom without the necessity of a formal statement.

(Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 26(A) at 17) (emphasis added) This claim of academic freedom is a far cry from the AAUP Statement:

> a. Teachers are entitled to full freedom in research and in the publication of the results, subject to the

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[13] For reasons that do not appear of record, Lipscomb claimed that it did subscribe to the AAUP's Statement both in the Closing Certificate of the University in the 1991 Bond Re-Issue, (Docket No. 13, attach. Ex. 6, para. 18(c)), and in the Official Statement released in conjunction with the Bond Re-Issue, (Docket No. 1, attach. Ex. D at 21).

adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

b. Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. [14] Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.[15]

c. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should

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[14] The 1970 Interpretive Comments to the 1940 Statement added the following note:

> The intent of this statement is not to discourage what is 'controversial.' Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject.

(Docket No. 259, attach. Ex. B at 2)

[15] The 1970 Interpretive Comments to the 1940 Statement added the following note:

> Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 *Statement*, and we do not now endorse such a departure.

(Docket No. 259, attach. Ex. B at 2)

> remember that the public may judge their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

(Docket No. 259, attach. Ex. B at 1)

The religious orientation of Lipscomb is driven home to the faculty in the Faculty Handbook:

> The heart of each day's activities at David Lipscomb University is the chapel service. It is here that the entire Lipscomb family gains strength and inspiration for the tasks of the day. *Since attendance at chapel is compulsory for all students, it is expected that each faculty member will attend chapel regularly.* No arrangements should be made which require regular Chapel absences of one or more times each week without prior written approval of the Dean.

Id. at 28 (emphasis in original). Lipscomb President Harold Hazelip stated in his deposition that, while this last policy is not enforced, faculty members are expected to attend chapel every day. (Docket No. 209, Deposition of Harold Hazelip, at 100) The Faculty Handbook also states that it is Lipscomb's mission "to serve its students so that they may master knowledge and skills appropriate to them and become Christlike in attitude and behavior." (App. C; Docket No. 209, Deposition of Harold Hazelip, attach., Ex. 26(A) at 1)[16]

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[16] The Faculty Handbook greatly emphasizes the role of religion in the daily life and academic pursuits of Lipscomb. Several portions of the Handbook containing these statements are reproduced in the Appendices to this opinion. *See* Apps. B-E.

At the administrative and faculty level, all members of Lipscomb's Board of Directors are required to be in good standing with the Churches of Christ, and all members of Lipscomb faculty and staff, with the exception of food services and grounds maintenance, must be members of the Churches of Christ. In addition, Lipscomb's published policies require its faculty to attend Church of Christ religious services several times each week and subscribe to Church of Christ doctrine as delineated in Lipscomb's policies. Former Dean of Lipscomb, Norman Parks, outlined some of the beliefs required of Lipscomb faculty in a letter to Mayor Boner *opposing* the bond issue:

> No person can be employed at Lipscomb who is not a member of the mainline Church of Christ. He cannot be a premillennialist or believe that instrumental music is acceptable for worship of God. He must believe that a divorced person cannot remarry and continue in church. He must believe that a woman cannot teach a class in religion to men.[17]

(App. A; Docket No. 206, Deposition of William Hill Boner, attach. Ex. 6) While recognizing that "there are divorces accepted by churches of Christ," Lipscomb specifically states that it will not employ divorced persons on the faculty, because "we [the university] also believe that God never planned

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[17] The court has not found any written policy stating that women are not allowed to teach courses in religion to male students. The excerpt from the Fall 1990 Class Schedule provided by the plaintiffs does support this statement, however. Of the 77 classes offered that semester by the Bible Department, only one course lists a female instructor. (Docket No. 1, attach. Ex. G, attach. Ex. 15) This course is abbreviated as "BT: Ruth, Est, Lame--Wom," and is listed as being taught by Carolyn Baker, a part-time faculty member in the Bible Department. *See id.* The "Wom" listing is unique to this course and may well indicate, as the plaintiffs imply, that the class is limited to women.

divorce as the best situation for any Christian." (App. D; Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 26(A) at 61)

Moreover, all faculty members at Lipscomb are contractually bound to support the academic and religious policies of Lipscomb as announced by the Board of Directors or the Administration.[18] The 1989-90 Faculty Handbook, portions of which are appended to this opinion, applies to all faculty and staff members, not merely to members of the Bible Department. The handbook clearly shows that every member of Lipscomb's faculty is expected to be committed to the religious beliefs and religious mission of Lipscomb, in all classes, and at all times. *See* App. B-E. If a faculty member were to join a church that was not a Church of Christ, it would be considered by Lipscomb as grounds for termination of his or her employment contract. (Docket No. 209, Deposition of Harold Hazelip, at 103) Lipscomb reserves the right to discriminate under Title VII of the Civil Rights Act of 1964 (as amended)

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[18] The 1989-90 Faculty Handbook states:

> Through the years some basic conditions and commitments have distinguished David Lipscomb University from many other institutions. A prerequisite for membership on the faculty is loyalty to New Testament Christianity as understood and traditionally practiced among churches of Christ. This includes complete and unwavering acceptance of the Bible as the divinely inspired word of God; faithfulness in personal life to those ideals and habits which contribute to purity and opposition to the various forms of worldliness; and active participation in the work of a local congregation. Acceptance of a position on the faculty is considered a commitment to these principles. Opposition to them either in teaching, personal life, or influence would have to be judged a violation of the contract between a teacher and the university. A clause to that effect is inserted in the contract of every teacher.

(App. B; Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 26(A) at 5)

against faculty or students "where it is necessitated by the specific religious tenets held by the institution." (Docket No. 268, para. 56(i))

Seventy-seven percent of the students at Lipscomb were affiliated with the Churches of Christ at the time the bonds were issued. (Docket No. 268, para. 56(p); Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 14 at 48; *id.* Ex. 15 at 44) In an admissions brochure for prospective students, Lipscomb states that "[o]ne common thread that binds students together is their commitment to Christ. At Lipscomb, a student's love for the Lord is strengthened by this special association with other students, the majority of whom share the same spiritual values." (App. F; Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 25) Two of the ways in which the "spiritual emphasis of Lipscomb" is promoted among the faculty and students are through the Bible classes and chapel services offered daily, which every full-time student attending classes must attend and which faculty are encouraged to attend. *See id.*

Every Lipscomb student unofficially majors in Bible and all students are required to take one class in the Bible every day of every semester. Failing a Bible course results in a student's being placed on "Bible probation." (Docket No. 202 at 7-8) Students who do not pass every Bible course carried during the semester of probation are dropped from the school. (Docket No. 209, Deposition of Harold Hazelip, at 38) From 1990 until 1992, approximately 100 undergraduate students were placed on Bible probation. (Docket No. 268, para. 56(e))

Although theology courses are commonly offered and/or required at liberal arts institutions, the Bible classes offered and required at Lipscomb are somewhat unique. In *Tilton*, the Court found that the theology courses taught at the challenged institutions in that case were

> taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize. Indeed, some of the required theology courses at Albertus Magnus and Sacred Heart are taught by rabbis.

Tilton, 403 U.S. at 686-87, 91 S.Ct. at 2100; *see also Roemer*, 426 U.S. at 751, 756 n. 20, 96 S.Ct. at 2347, 2349 n. 20. At Lipscomb, the religion classes are Bible classes, not theology classes. This is significant because "David Lipscomb University is not . . . merely an institution which requires every student to take a lesson in the Bible each day; this study is the wellspring from which the university issued." (App. C; Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 26(A) at 1)

The Bible, as taught in the Bible classes, is viewed as "the revealed will of God to man and as the ***only and sufficient rule of faith and practice.***" *See id.* (emphasis added). There are more classes offered each semester in the Bible department than in any other department, even though only a small percentage of the students officially major in Bible. (Docket No. 263, Aff. W. Craig Bledsoe, para. 11 (attached charts)) In the 1990-91 Bulletin, Lipscomb outlines the general education requirements. (Docket No. 1, attach. Ex. B at 30) Under the daily Bible requirement, Lipscomb states:

> Although the daily Bible requirement is important enough to be listed as a separate part of each student's academic program, it is also considered an ***integral part of the general education program at David Lipscomb University. No body of knowledge or study***

> ***of any kind is as important as the study of the Bible itself.***

Id. (emphasis added). In meeting the Bible requirement at Lipscomb, each student must take at least one course from each of four categories: The Gospels, The Church, Old Testament, and Defense of the Faith. *See id.* These classes, taught only by members of the Churches of Christ, are not the broad, encompassing theology classes of *Tilton;* instead, they "not only teach more about God's will but also give each student the opportunity to develop his or her own personal relationship with the Lord." (App.F)

Every full-time Lipscomb student is also required to attend chapel every school day, where attendance records are carefully maintained and missing worship services may lead to "chapel probation." (Docket No. 268, para. 56(g); Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 16 at 25) From 1990 until 1992, 40 to 60 students were on chapel probation each semester. (Docket No. 268, para. 56(h)) As explained in Lipscomb's admissions brochure, the chapel services are "where faculty and students assemble for a few minutes each day to sing praises to God and study the Bible." (App.F)

In all aspects, student life is guided by the religious principles of the school. (Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 16 at 35) Lipscomb prohibits students from dancing, consuming alcohol, and using tobacco products of any kind, all of which are considered types of conduct that do not conform to the standards of a Christian institution. (Docket No. 268, para. 56(k)) There is no visitation in the dormitories by members of the opposite sex other than during "official open houses," and the students must conform to a strict dress code as outlined in the Handbook. (Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 16 at 39-40) These rules also extend beyond Lipscomb's grounds, as the Student Handbook states: "Students are not to be present at any establishment or

event at which the principal purpose is known to be the sale and/or consumption of alcoholic beverages or dancing. Misconduct, regardless of where it takes place, which brings discredit upon the university will subject the student to strict disciplinary action." *Id.* at 37. Lipscomb encourages students to attend regular church services and provides lists of local churches--but only Churches of Christ churches--to its students. (Docket No. 268, para. 56(1))

The Bulletin[19] for Lipscomb students provides:

> The Bible has always been considered the most important area of study for all students at David Lipscomb University. The founders, and those who have followed them, have held it to be important that every student study the Bible. Whatever their major interest of life work, a thorough knowledge of Biblical principles is needed.
>
> In daily classes, Bible is taught as the inspired word of God. Students are encouraged to apply the Bible principles of right living to all aspects of personal and professional life.

(Docket No. 268, para. 56(*o*)) The Bulletin, quoting an original mission statement issued by its founders, also states:

> The supreme purpose of the school shall be to teach the Bible as the revealed will of God to man, and as the only and sufficient rule of faith and practice. And to train those who attend in pure Bible Christianity, excluding from the faith all opinions and philosophies

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[19] The Bulletin that was used in the deposition of Hazelip was from 1988-89, rather than the 1990-92 period covered by this lawsuit. However, Hazelip agreed that it remained largely unchanged and, where there were changes, Hazelip made note of those changes. (Docket No. 209, Deposition of Harold Hazelip, at 57-73)

> of men. And from the work and worship of the church of God, all human inventions and devices.
>
> Such other branches of learning may be added as will aid in the understanding and teaching of the scriptures, and as will promote usefulness and good citizenship among men.

(Docket No. 209, Deposition of Harold Hazelip, at 60) Hazelip testified that the statement has not been revoked, but that in modern mission statements, Lipscomb has "broadened and amplified" the description of its mission. (Docket No. 209, Deposition of Harold Hazelip, at 61)

The evidence presented in the depositions and literature of Lipscomb shows that, while Lipscomb may effectively teach a wide variety of secular courses, the central mission of the school is to inculcate and promote Churches of Christ doctrine as the true word of God.[20] Students are taught entirely by Churches of Christ members; are informed of the importance of the Bible in all areas of their lives; are expected to attend Bible courses and chapel on a daily basis and surrounded by an environment thoroughly saturated by Churches of Christ doctrine. The school does not follow the Statement of Principles on Academic Freedom of the AAUP, and the section of the faculty handbook dealing with research states that the primary aim of every instructor should be to give superior academic instruction, emphasizing daily instruction in the Bible. Lipscomb's Board of Directors, which controls all major decisions of the school, contains only members of the Church of Christ. (*See also* App. B; Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 26(A) at 6) Christian education is one of the three principal duties of the president of the school.

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[20] *See* Appendices to this opinion for excerpts of Lipscomb's own statements regarding the importance and prevalence of religious life at the university.

In this environment, the chance that religion "would seep into the teaching of secular subjects," as discussed in *Roemer,* 426 U.S. at 751, 96 S.Ct. at 2347, seems inevitable.

In response, the defendants assert that Lipscomb offers a good education and graduates students with degrees in 76 different majors. (Docket No. 263, Aff. W. Craig Bledsoe, para. 10) Lipscomb is accredited by numerous higher education accrediting agencies, *id.* at para. 9,[21] including the Commission on Colleges of the Southern Association of Colleges and Schools, which is the exclusive regional accrediting body for eleven southern states and Latin America. *Id.* at para. 7. Lipscomb asserts that the high academic standards and high-quality students the school graduates justify Metro's approval of the bonds and provide a basis for Metro's legitimate, legislative purpose. However, Lipscomb's academic integrity is beside the point. If the religious mission of Lipscomb is so intertwined with the academic goals that they cannot be separated, no matter what worthwhile projects the tax-free bonds financed, they were state support for Lipscomb's religious message. Metropolitan Government cannot support or promote religion--any religion--and be in conformity with the First Amendment.

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[21] Many of these accreditations have come in the last several years, and the plaintiffs have submitted a Motion to Strike portions of the affidavit that discuss changes at Lipscomb since the bonds were issued. (Docket No. 254) This motion will be denied. In determining whether the primary mission of Lipscomb is to inculcate religious doctrine, the court cannot ignore evidence of efforts to improve the school's academic standing.

d. Defendants' Arguments in Response to Use of Pervasively Sectarian Test

i. Nature of Tax-Exempt Bond Issue

Defendants Lipscomb and Metro assert that, even if the court finds that Lipscomb is pervasively sectarian, there has been no First Amendment violation because the bonds were not a direct benefit to the school from the government. There are a number of different arguments within this assertion: (1) the benefit does not come from the government; (2) the benefit does not go to the school; and (3) any benefit Lipscomb does receive is incidental. Each of these arguments fails under the facts of this case and under the law.

Before considering the different issues raised by the defendants in regard to the nature of the governmental aid, it is necessary to briefly outline the form and structure of a typical municipal bond issue under the Tennessee statutory scheme. *See* TENN. CODE ANN. § 7-53-101 *et seq.* (1985). The statute provides a system for local governments to encourage business, industry, and education through offering development loans at a reduced cost. *See id.* The governments are able to obtain the funds to offer these low-interest loans by issuing tax-exempt municipal bonds. *See id.* In theory, there are three significant parties in this transaction: the municipal Authority issuing the bonds, the Bond Purchasers, and the Entity seeking low-interest government financing. The Entity seeks a low-interest loan from the Authority in order to fund development in the area. The Authority issues tax-free revenue bonds on the bond market, and they are purchased by the Bond Purchasers. Until the bonds mature, the Bond Purchasers accrue interest on the bonds. When the bonds mature, the Bond Purchasers redeem them with the Authority for their face value. The interest rate on the tax-free bonds is able to be lower than the rate on taxable bonds because the Bond Purchasers are getting the

additional value of tax-exempt interest. The Authority takes the money from the bond sale and loans it to the Entity. The interest rate on the loan is lower than that available through private bank financing because the Authority is able to pay a lower interest return rate on the bonds to the Bond Purchasers. The Entity uses the loan proceeds for projects and repays the loan plus interest over the same time period as the life of the bonds. The Authority uses the money repaid by the Entity to pay the interest on the bonds and to redeem the bonds at face value when they mature.

In reality, the government Authority issuing the bonds does not involve itself in all the financial details of the transaction. Instead, the Authority arranges to borrow the bond proceed amount from a bank at the time of the bond issuance. The Authority names the bank as trustee of the bond issue, and the bank disperses the money "borrowed" by the Authority to the Entity. In return, the Authority assigns its interest in the loan to the Entity to the bank, so that the Entity is repaying the bank directly. The bank markets the municipal bonds, reimbursing itself the money already advanced to the government and loaned to the Entity. The Entity repays the bank, and the bank repays the Bond Purchasers when their bonds mature.

This is the basic scenario of the bond transaction in this case. Lipscomb approached the Board, an instrumentality of Metro, in order to seek a low-interest development loan from the proceeds on a tax-free bond issuance. (Docket No. 1, attach. Ex. F(F); Docket No. 13, attach. Ex. 12) Sovran Bank acted as the trustee and advanced the money to the Board. (Docket No. 13, attach. Ex. 10) This agreement is laid out in detail in the Indenture signed by the Board and by Sovran Bank. *See id.; see also* Docket No. 13, attach. Ex. 3(C). In return for the advance, the Board assigned its interest in the loan agreement between the Board and Lipscomb to Sovran Bank. (Docket No. 13, attach. Ex. 3(C); *id.*, attach. Ex. 12) As a result, the money

involved in the Lipscomb loan came from Sovran Bank and was repaid to Sovran Bank, but it was still a loan from the Board and, hence, from Metro.

ii. Source of Benefit

The defendants' first argument is that the benefit Lipscomb received did not come from the government but from the Bond Purchasers who purchased the tax-exempt revenue bonds. This is incorrect for a number of reasons. The Loan Agreement is clearly between the Industrial Development Board and David Lipscomb University. (Docket No. 13, attach. Ex. 12) The municipal bond issue was simply the financing tool through which the government was able to collect funds sufficient to meet the $15,000,000 agreed to in the loan. To say that the benefit comes from private investors rather than from the government is also to ignore the fact that Lipscomb intentionally sought government financing instead of private financing. The benefit that Lipscomb received in doing so was a lower interest rate on its loan. Lipscomb went to the Board in order to get a low-interest government loan, and that is exactly what it received.

iii. Beneficiary of the Bond Issue

Second, Metro makes the assertion that "the true beneficiaries of tax exemption are the bond holders and not Lipscomb University," and that, as a result, this is not aid to the university in violation of the Establishment Clause. (Docket No. 219 at 5) Although the bond holders did benefit financially from the tax-exempt nature of the municipal bonds, that is not the only benefit that accrued in this case. In *Hunt*, the Court examined a similar transaction and found that the aided institution clearly benefitted from the tax-exempt status of the bonds: "The income-tax-exempt status of the interest enables the Authority, as an instrumentality of the State, to market the bonds at a significantly lower rate of interest than the

educational institution would be forced to pay if it borrowed the money by conventional private financing." 413 U.S. at 739, 93 S.Ct. at 2872. Lipscomb has repeatedly stated that it received a substantial benefit from the tax-exempt bonds--some 30 percent of the cost of the project--and that it could not have completed the project if it had not been granted the benefit from Metro. *See, e.g.*, Docket No. 260 at 11 n. 7. It was Lipscomb, not some distant bond purchasers, who went to the Board to seek approval and it was Lipscomb that was granted approval by the Board and Metro's elected Mayor. There can be no question but that Lipscomb was benefitted, and this benefit was not attenuated by the fact that investors were able to share in it.

The form of aid provided to Lipscomb was a substantial, affirmative benefit that, unlike property tax exemptions, allowed Lipscomb to dramatically improve its facilities. Lipscomb improved not only its academic facilities, but the recreational facilities that would make the school more attractive to potential students. Students may only take advantage of these benefits if they agree to abide by the Churches of Christ aspects of the institution. This is a far cry from receiving bus fare to transport a student to the institution of his or her choice.

According to the undisputed facts, in 1989-90, improving the library facilities and student center were high priorities for Lipscomb. (Docket No. 268, para. 19) The Southern Association of Colleges and Schools (S.A.C.S.) had recommended improving Lipscomb's library and recreational facilities, and such an expansion was part of Lipscomb's

strategic plan to increase its enrollment from 2,250 to 3,000 students. (Docket No. 268, paras. 19-20)[22]

At that same time, donations to Lipscomb were down 10 percent and student enrollment had dropped 8 percent. (Docket No. 268, paras. 21-22) Lipscomb saved an estimated 30 percent of the interest it would have cost to find alternative financing for the construction projects and cannot say what projects would have gone unfunded if it had not received the tax-free bonds. (Docket No. 268, paras. 24-25) With the tax-free bonds, Lipscomb was able to fully fund construction projects that included work on the library, intramural sports building and field, parking lots, landscaping, computer mainframe, baseball stadium, tennis courts, fiber optics network, a pedestrian way, and renovation of the administration and business school buildings. (Docket No. 268, para. 25)

Unlike the cases in which textbooks, teachers or teaching materials were either loaned to schools or provided to the students, Lipscomb received a flow of funds into its coffers provided by a loan from the Board. These funds did not merely supplement the teaching of secular subjects at Lipscomb; they were central to the school's stated goal of increasing enrollment. If Lipscomb's mission is to promote Churches of

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[22] In fact, a brochure entitled "Questions and Answers" related to Lipscomb's "A Century of Vision" fund drive indicated that these improvements were required by the S.A.C.S. The brochure included the following:

> 10. **Why are the Library and Student Activities Center the top priorities?** The Commission on Colleges of the Southern Association of Colleges and Schools, which is our accrediting association, has mandated that we build these two structures in order to maintain our accreditation.

(Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 34) Lipscomb has since denied that the construction was required. (Docket No. 268, para. 19)

Christ doctrine, then Metro, through the Board, provided aid to promote Churches of Christ doctrine.

iv. Direct v. Indirect Benefit

Finally, the defendants argue that the benefit was not a direct benefit and, as a result, the *Tilton-Roemer* line of cases is inapplicable. According to the defendants, "[t]he benefit realized by Lipscomb from the government's action is the indirect, incidental benefit of a lower interest rate on its indebtedness resulting from the indirect benefit bondholders realize from the tax exemption on the interest income they realize from the bonds." (Docket No. 194 at 7) Because neither Metro nor the Board can be held responsible for the debt, the benefit must be classified as indirect, Lipscomb asserts.

To support this assertion, the defendants rely upon *Everson; Board of Ed. v. Allen,* 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968); *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 721 (1981); *Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983); *Witters v. Washington Dep't of Services for the Blind,* 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846, (1986); *Bowen v. Kendrick,* 487 U.S. 589, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988); *Zobrest; Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); and *Agostini.* The defendants assert that in "virtually every one of these cases, the governmental benefit to religious or sectarian schools was more direct than the benefit realized by Lipscomb in our case; and in virtually every one of these cases there was a closer 'nexus' between the State and a religious institution than could possibly exist in our case." (Docket No. 194 at 9)

There is no single, clear definition of "direct benefit" to control this analysis, either in any of these cases or in any other controlling cases the court can find. Not one of those cases discusses an indirect benefit as one that does not draw funds

directly from the public coffer. Instead, the Court considered the government action involved in determining the recipient of the benefit, the method of payment and the form of aid. No government decision-making was involved in providing the benefit to pervasively sectarian institutions in any of those cases--either because the institution was not pervasively sectarian or because the benefit went to a third party rather than to the institution.

In deciding that the aid in this case is a direct benefit from the government to Lipscomb, the court relies on precedent as well as on the facts of this bond issue. In *Hunt v. McNair,* the Supreme Court considered a tax-exempt revenue bond issue very similar to the bond issue in this case. *See* 413 U.S. at 735-37, 93 S.Ct. at 2870-71. The Court refrained from deciding whether the benefit was direct or indirect:

> The 'state aid' involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or by loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a 'governmental service.' The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a 'mere conduit.' Because we conclude

> that the primary effect of the assistance afforded here is neither to advance nor to inhibit religion under *Lemon* and *Tilton*, we need not decide whether, as appellees argue, the importance of the tax exemption in the South Carolina scheme brings the present case under *Walz v. Tax Comm'n*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), where this Court upheld a local property tax exemption which included religious institutions.

Id., at 745 n. 7, 93 S.Ct. at 2875 n. 7 (internal citations omitted). In cases since *Hunt*, however, the Court has implicitly recognized the bond proceed loan structure in that case as an example of direct state aid. *See Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 842, 115 S.Ct. 2510, 2523, 132 L.Ed.2d 700 (1995) (citing *Hunt* as one of the cases correctly cited by the Court of Appeals as establishing "the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions"); *see also Mitchell*, __ U.S. at __, 120 S.Ct. at 2546 (plurality opinion) (citing *Rosenberger* and the cases collected therein); *id.*, ___ U.S. at ___, 120 S.Ct. at 2559-60 (O'Connor, J., concurring in the judgment) (same).

Although the Court did not decide in *Hunt* whether the loan of municipal bond proceeds constituted a direct benefit, both later cases and the structure of the agreement between the government and the entity receiving funding indicate that such

an arrangement is, in fact, a direct benefit to the institution.[23] In addition, Lipscomb's counsel's own statements at oral argument support this finding. In attempting to differentiate a direct benefit from an indirect benefit, counsel offered the following definition: "How do you distinguish, how do you define direct versus indirect? And the definition, we believe, is that direct aid is a direct transfer of money or property either in the form of a grant or in the form of a loan from the government to the institution." (Oral Arg., May 10, 2000) Although the court does not specifically adopt this narrow definition, it, too, would support the court's finding that the aid provided in this case was a direct benefit to Lipscomb. As discussed previously, the Loan Agreement was between the Board and Lipscomb. The money went directly to Lipscomb in the form of a loan from the Board, an instrumentality of Metro.

In spite of the numerous arguments offered by the defendants in attempts to restrict the definition of a direct benefit, it is clear that a direct benefit is precisely what

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[23] In a supplemental memorandum in support of summary judgment, (Docket No. 246), Lipscomb relies on the finding of a court in the Eastern District of Michigan that a loan of proceeds from a municipal bond issue is not a direct government benefit to a religious educational institution. *See Johnson v. Economic Dev. Corp.*, 64 F.Supp.2d 657, 667. The *Johnson* court stated:

> The Court also finds it significant that the funds at issue in this case did not take the form of a grant or loan of tax-raised money. Instead, one hundred percent of the funds came from private investors . . . . The Oakland EDC served merely as a conduit--that is, defendant simply provided a means by which private investors could finance the project. Not a single penny of the funds came from any state, county, or municipal source, and no public entity has any obligation whatsoever in connection with the sale or purchase of these limited obligation bonds.

Id. The decision of a fellow district court is not binding on this court. For the reasons stated in this opinion, this court respectfully disagrees with the position of the *Johnson* court.

Lipscomb received. The government chose to provide Lipscomb with low-interest financing through a loan agreement. The government obtained the funding for that loan by issuing tax-exempt municipal bonds and assigned the loan to Sovran Bank, but the loan still came from the Board and, hence, from Metro.

v. Other Defense Arguments

In addition to challenging the nature of the aid provided to Lipscomb, the defendants challenge the use of the pervasively sectarian test on the grounds that the standard to determine whether Lipscomb is pervasively sectarian is too vague for the court to properly apply it. The defendants also contend that to find for the plaintiffs on this issue would create entanglement problems because the court would be forced to go "trolling through" Lipscomb's religious beliefs, which the defendants assert *Mitchell* has declared unacceptable under the Establishment Clause. It would be within the *Mitchell* ruling, and generally more in keeping with the First Amendment, for the court to merely consider the neutrality of the statute and its even-handed application, the defendants assert. However, as noted above, no Establishment Clause analysis can be undertaken without considering the specific circumstances of the case and numerous factors--some of which may be vague and difficult to apply.

Finally, the defendants asserted during oral argument that, by applying these factors, the court may encourage religious schools to alter their teachings to qualify for state funds and would, therefore, be creating additional state entanglement with religion. The court finds this argument unpersuasive and illustrative of the problem created by a single-issue test such as the one the defendants propose. If this assertion were true, then any rejection of state sponsorship of religion would be encouraging religious institutions to alter their basic tenets.

Denying a benefit to an institution that would use that benefit specifically to indoctrinate others with their religious message is not hostile to religion, it is just not supportive of that religion, which is precisely what the First Amendment demands of the state.

The pursuit of promoting a thoroughly Christian education makes Lipscomb an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in religious mission. Worship as proscribed by the Church of Christ is so much a part of daily life on Lipscomb's campus that it is completely intertwined and inseparable from the pursuit of academic excellence. The low-interest loan provided to Lipscomb from the government was a direct and substantial benefit to the school. As such, the government benefit bestowed upon Lipscomb sponsors the inculcation of the Churches of Christ doctrine and it violates the First Amendment's Establishment Clause.

3. Recent Cases of Aid to Public Schools

In their Motion for Summary Judgment, plaintiffs rely solely on the argument that Lipscomb is a pervasively sectarian institution. The defendants, as discussed above, argue that this is an improper approach. In light of the often-confusing nature of Establishment Clause jurisprudence and in order to guarantee that the issues of this case have been considered fully, the court will also examine the Lipscomb bond issue under the guidelines culled from the Court's decisions on government aid to religious schools in general.

In determining the effect of the government aid, the court is concerned with whether the aid results in governmental indoctrination, whether the recipients are chosen in reference to their religion, and whether the aid results in excessive entanglement between the government and religion. *See Agostini,* 521 U.S. at 234, 117 S.Ct. at 2016. In *Agostini,* one

of the Court's most recent cases to discuss these issues, the Court found that cases in the past had generally "assessed a law's 'effect' by examining the character of the institutions benefitted (e.g. whether the religious institutions were 'predominantly religious'), and the nature of the aid that the State provided (e.g. whether it was neutral and nonideological)." *Id.*, at 232, 117 S.Ct. at 2015 (internal citations omitted). The nature of the institution benefitted has already been examined in some detail, so the court will focus on the nature of the aid provided and on the limitations placed on that aid.

In the Court's most recent Establishment Clause decision, *Mitchell v. Helms,* Justice Thomas, writing for the plurality, found that, "If aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefitting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'" *Mitchell v. Helms,* ___ U.S. ___, 120 S.Ct. 2530, 2544, 147 L.Ed.2d 660 (2000) (plurality opinion) (quoting *Witters v. Washington Dept. of Servs. for the Blind,* 474 U.S. 481, 489, 106 S.Ct. 748, 752, 88 L.Ed.2d 846 (1986)).[24] These two factors, the neutrality of the government aid and whether the aid was given directly to the institution or first went to private individuals, have become significant signposts in determining whether the government has advanced religion. *See Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1, 9-10, 113 S.Ct. 2462, 2467, 125 L.Ed.2d 1 (1993); *Witters,* 474 U.S.

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[24] As Justice Thomas' comment indicates, the Court has also considered whether the aid is direct or indirect as a factor in determining whether government aid impermissibly advances religion. As that issue was considered in the previous section, it will not be addressed again. The aid provided to Lipscomb through the loan of the proceeds from the bond issue was direct government aid. *See supra,* Part C.I.(d)(iv).

at 486-87, 106 S.Ct. at 751; *Mueller v. Allen,* 463 U.S. 388, 398-99, 103 S.Ct. 3062, 3068-69, 77 L.Ed.2d 721 (1983).

In addition to these two factors, the Court has also focused on whether the government aid is effectively limited to supporting only the secular interests of the religious institution. *See, e.g., Mueller,* 463 U.S. at 403, 103 S.Ct. at 3071; *Committee for Publ. Educ. and Religious Liberty v. Regan,* 444 U.S. 646, 653-57, 100 S.Ct. 840, 846-49, 63 L.Ed.2d 94 (1980). Where the aid can be limited to assisting only the secular functions of the school and there is adequate monitoring to ensure that this limitation is adhered to, then the Court has found that the government aid does not have the effect of advancing the religious interests of the school. *See Agostini,* 521 U.S. at 233-35, 117 S.Ct. at 2015-16.

In order to determine whether the aid offered to Lipscomb had the effect of advancing the religious beliefs of the institution, the court must consider whether the aid was neutrally available without regard to the religious nature of the school, whether the government or private individuals ultimately chose to offer the aid to Lipscomb, and whether there were adequate safeguards to ensure that the government aid would assist only the secular functions of the school. The court will address each issue in turn.

a. Neutrality

As Justice Thomas, writing for the plurality, recently noted, "In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." *Mitchell v. Helms,* ___ U.S. at ___, 120 S.Ct. at 2541; *see also Rosenberger v. Rector and Visitors of the Univ. of Virginia,* 515 U.S. 819, 839, 115 S.Ct. 2510, 2521, 132 L.Ed.2d 700 (1995) ("We have held that the

guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.") (citing *Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet,* 512 U.S. 687, 704, 114 S.Ct. 2481, 2491, 129 L.Ed.2d 546 (1994) (Souter, J.); *Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481, 487-88, 106 S.Ct. 748, 751, 88 L.Ed.2d 846 (1986); *Meuller v. Allen,* 463 U.S. 388, 398-99, 103 S.Ct. 3062, 3069, 77 L.Ed.2d 721 (1983); *Widmar v. Vincent,* 454 U.S. 263, 274-75, 102 S.Ct. 269, 277, 70 L.Ed.2d 440 (1981)); *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1, 8, 113 S.Ct. 2462, 2466, 125 L.Ed.2d 1 (1993) ("[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."); *Roemer v. Board of Publ. Works of Maryland,* 426 U.S. 736, 746, 96 S.Ct. 2337, 2344, 49 L.Ed.2d 179 (1976) (finding that "religious institutions need not be quarantined from public benefits that are neutrally available to all"); *Walz v. Tax Commission,* 397 U.S. 664, 676-77, 90 S.Ct. 1409, 1415, 25 L.Ed.2d 697 (1970) ("Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise . . . this kind of benevolent neutrality toward churches . . . so long as none was favored over others . . . .").

Although religious institutions are eligible to receive government aid under the neutrality principle, the Court has recognized that "the line between state neutrality to religion and state support of religion is not easy to locate." *Board of Educ. of Central Sch. Dist. No. 1 v. Allen,* 392 U.S. 236, 242, 88 S.Ct. 1923, 1926, 20 L.Ed.2d 1060 (1968). What the defendants

advocate is a bright line Establishment Clause test that permits all government aid that appears neutral on its face. Such a simplistic approach is clearly inappropriate under the Establishment Clause, as Justice Blackmun, writing for the plurality, recognized in *Roemer:*

> The State must confine itself to secular objectives, and neither advance nor impede religious activity. Of course, that principle is more easily stated than applied. The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity. The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike. The Court also has taken the view that the State's efforts to perform a secular task, and at the same time avoid aiding in the performance of a religious one, may not lead it into such an intimate relationship with religious authority that it appears either to be sponsoring or to be excessively interfering with that authority.

Roemer, 426 U.S. at 747-48, 96 S.Ct. at 2345 (plurality opinion). As *Roemer* makes clear, then, in evaluating the neutrality of the government aid program, the court must look at both the facial neutrality of the statute and the manner in which the statute is applied in providing aid to specific groups. *See id., see also Bowen v. Kendrick,* 487 U.S. 589, 609-10, 108 S.Ct. 2562, 2574, 101 L.Ed.2d 520 (1988) ("Of course, even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion.").

In this case, the plaintiffs do not challenge the constitutionality of the industrial development board statute on its face. Instead, the plaintiffs attack only the decision by the Board to issue tax-free bonds and to loan the proceeds from those bonds to Lipscomb. There is no question that the statute is neutral on its face. The purpose of the statute authorizing the incorporation of local industrial development boards is explained in Tennessee statute § 7-53-102(a):

> It is the intent of the legislature by the passage of this chapter to authorize the incorporation in the several municipalities in this state of public corporations to finance, acquire, own, lease, and/or dispose of properties to the end that such corporations may be able to maintain and increase employment opportunities, increase the production of agricultural commodities, and increase the quantity of housing available in affected municipalities by promoting industry, trade, commerce, tourism and recreation, agriculture and housing construction by inducing by inducing manufacturing, industrial, governmental, educational, financial, service, commercial, recreational and agricultural enterprises to locate in or remain in this state and further the use and production of its agricultural products and natural resources, and to vest such corporations with all powers that may be necessary to enable them to accomplish such purposes.

TENN. CODE ANN. § 7-53-102(a)(1985). This statute is in no way skewed toward or against religious institutions on its face, and the eligibility of an entity to apply for financial assistance from the Board is based on neutral criteria.

But the facial neutrality of the statute does not end the court's inquiry, because the court must also consider the

neutrality exercised by the Industrial Development Board in issuing these bonds for the benefit of Lipscomb. That is a nearly impossible task in this case because so little evidence has been provided concerning the standards used by the Board and by the mayor in deciding to approve the Lipscomb bond issue. In his deposition, Mayor Boner recalled little of the decision-making process that he went through in deciding to approve the revenue bonds as tax-exempt. (Docket No. 206, Deposition of William Hill Boner, at 33, 38-39, 51-52) The transcripts of the public meetings and hearings held by the Board in relation to the bond issue and reissue do not provide any information regarding the standards used by the Board in approving the bond issue. (Docket No. 1, attach. Exs. F, G, I)[25] Based on this lack of evidence, the court cannot find, as a matter of law, that the decision to provide financial assistance to Lipscomb was made on a neutral basis. As a result, the court must rely on other factors to determine whether the defendants' actions advanced the religious beliefs of Lipscomb.

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[25] At the first public meeting, held on April 10, 1990, plaintiffs' counsel was present to voice concerns regarding the bond issue. (Docket No. 1, attach. Ex. F, Transcript of Public Meeting of April 10, 1990, at 6) At the close of the meeting, the Board voted unanimously to approve the bond issue, leaving the Establishment Clause issues to counsel to determine afterward. *See id.* at 11-15. At the first public hearing, held on April 16, 1990, the only representative of the Board present to hear from the public was Mr. Bobby Davis, the attorney for the Board. (Docket No. 1, attach. Ex. F, Transcript of Public Hearing of April 16, 1990, at 1) At the second public hearing, plaintiffs' counsel was not permitted to read into the record documents he had brought with him concerning the nature of Lipscomb but was allowed to submit them to the Board. (Docket No. 1, attach. Ex. G, Transcript of Public Hearing of May 30, 1990, at 18-19) At the close of the second hearing, the Board again voted to approve the bond issue. *See id.* at 52-53.

b. Individual Choice

A second important factor to consider in determining whether the aid to Lipscomb had the impermissible effect of advancing religion is whether the aid was given to the religious institution at the discretion of the government or as the result of independent choices of private individuals. In recent years, the Court has found this factor to be of increasing significance, especially where the government aid goes to sectarian institutions. *See Agostini,* 521 U.S. 203, 225-26, 117 S.Ct. 1997, 2011-12, (citing *Zobrest v. Catalina Foothills Sch. Dist.,* 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993); *Witters v. Washington Dept. of Servs. for Blind,* 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986); *Committee for Pub. Ed. and Religious Liberty v. Nyquist,* 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973)). Where the government funds are provided to individuals who then decide to use those funds in support of religious education, the Court has found that there is no government support of religion. *See, e.g., Zobrest,* 509 U.S. at 8-10, 113 S.Ct. at 2466-67. Where the government funds are provided directly to the religious institutions without the intervening decisions of private individuals, the government support is more likely to be found to have the effect of advancing the religious purposes of the institution.

In this case, Lipscomb asserts that there was independent, individual, private choice involved in providing the benefit of the bond issue to Lipscomb. Lipscomb's argument relies on the fact that private investors purchased the bonds, the proceeds of which were loaned to Lipscomb. This argument is without merit. Although the bonds were marketed to private investors, the Board, not the private investors, decided who would receive the benefit of the sale of the bonds. The private investors could not select which institution they wanted to receive the funds. They merely chose to invest in tax-free bonds. This is nothing like parents choosing to send their children to a parochial

school. Such government selection is a drastic alteration of the implications that may be drawn from Metro's providing the benefit because, as Justice O'Connor noted, "[E]ndorsement of the religious message is reasonably attributed to the individuals who select the path of the aid." *Mitchell*, ___ U.S. at ___, 120 S.Ct. at 2559 (O'Connor, J., concurring in judgment). Clearly, the Board, and through it Metro, made the decision to issue bonds for the benefit of Lipscomb.

c. Use Restricted to Secular Functions

There is one other factor that the Supreme Court has found significant in determining whether government aid to sectarian institutions has had the effect of advancing religion in violation of the Establishment Clause: whether there are sufficient restrictions and conditions on the aid to ensure that the government funds can be used to support only the secular, and not the sectarian, functions of the institution. *See Committee for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980) (finding that a statute did not violate the Establishment Clause because the statute properly limited the state aid to secular functions of religious schools); *Levitt v. Committee for Publ. Educ.*, 413 U.S. 472, 480, 93 S.Ct. 2814, 2819, 37 L.Ed.2d 736 (1973) (invalidating a statute providing financial assistance to private schools for educational testing because there were not adequate safeguards in the statute to ensure that the funds would be used only for secular purposes); *Board of Educ. of Central Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) (refusing to invalidate a state program that provided textbooks to all schools where books were chosen by public school authorities and religious books were not allowed to be approved).

The Court has found that sectarian institutions may receive government funding as long as the funds are used solely to advance the secular interests and purposes of those institutions. *See, e.g., Roemer,* 426 U.S. at 759, 96 S.Ct. at 2351. Evaluating government financing under this standard requires the court to consider the effectiveness of the statutory and contractual restrictions placed on the government assistance, as well as the oversight and enforcement provisions designed to ensure compliance. There must be clear legal limitations on the use of the government funds to ensure that the aided institutions neither can nor will use the funds to advance sectarian interests.

i. Sufficiency of Procedural Mechanisms To Ensure Funds Advance Only Secular Purposes

Beyond ensuring that the initial use of the government funds did not support sectarian interests, the government must also provide adequate procedural safeguards to ensure that funds originally provided for secular purposes do not, over time, become directed toward the religious purposes of the institution. As the Court stated in *Nyquist,* "In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Nyquist,* 413 U.S. at 780, 93 S.Ct. at 2969. Although the effectiveness of government restrictions must be determined on the facts of the individual case, prior decisions from the Court have established some helpful guidelines.

In *Tilton v. Richardson,* the Court considered a federal statute that offered grants and loans to educational institutions. 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971). The statute excluded any pervasively sectarian institutions from receiving aid and gave the United States a 20-year interest in any facilities built with federally-provided funds. *See id.,* at

675, 91 S.Ct. at 2094. During this period, the institutions were prohibited from using the facilities for "sectarian instruction, religious worship, or the programs of a divinity school," and the restriction was to be enforced through on-site inspections. *Id.* The Court invalidated this portion of the statute and Chief Justice Burger, writing for the plurality, found that:

> Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. Congress did not base the 20-year provision on any contrary conclusion. If, at the end of the 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion
>
> To this extent the Act therefore trespasses on the Religion Clauses. The restrictive obligations of a recipient institution under § 751(a)(2) cannot, compatibly with the Religion Clauses, expire while the building has substantial value.

Id., at 683, 91 S.Ct. at 2098 (plurality opinion).

In *Hunt v. McNair*, the Court considered a statute similar to that at issue in this case, where the Educational Facilities Authority of the state government ("Authority") issued tax-exempt bonds and loaned the proceeds to institutions of higher education. 413 U.S. 734, 735-36, 93 S.Ct. 2868, 2870-71, 37 L.Ed.2d 923 (1973). Under this program, the institution would convey to the Authority the land on which the facilities funded by the loan would be built. *See id.*, at 738, 93 S.Ct. at 2871-72. The Authority would then lease the property back to the college

during the repayment of the loan and would reconvey the property to the college once the loan was repaid. *See id.* The statute contained a provision that no funds could be used to support "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination." *Id.*, at 736-37, 93 S.Ct. at 2871. In addition, the lease agreement between the Authority and the college contained a similar restriction, which could be enforced through inspections by the government. *See id.*, at 739, 93 S.Ct. at 2872. Finally, the reconveyance of the land to the college once the loan was repaid was also required to "contain a restriction against use for sectarian purposes." *Id.*, at 739-40 & n. 4, 93 S.Ct. at 2872 & n. 4. In considering the primary effect of the aid offered to particular schools, the Court found that these provisions were sufficient to ensure that the government aid would not be used to advance the religious purposes of the schools. *See id.*, at 743-44, 93 S.Ct. at 2874-75.

In *Roemer v. Board of Publ. Works of Maryland*, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976) (plurality opinion), and in *Bowen v. Kendrick*, 487 U.S. 589, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988), the Court reiterated the need for clear restrictions on the use of government funds by sectarian institutions and for sufficient enforcement provisions of those restrictions. In *Roemer*, the Court found that the requirement that government aid support only the secular functions of the school was satisfied "by the statutory prohibition against sectarian use, and by the administrative enforcement of that prohibition through the Council for Higher Education." 426 U.S. at 759, 96 S.Ct. at 2351. The administrative enforcement included sworn affidavits from the institution's chief executive officer that the funds would not be used to support the institution's sectarian interests, separate accounts for state

funds, documentation of the use of state funds, and inspection and audit rights to ensure proper use if the Council deemed such steps necessary. *See id.*, at 742-43, 96 S.Ct. at 2342-43. In *Bowen*, there were no explicit statutory restrictions on the use of government funds, but the Court found that the Act indicated that religious uses of the government funds were contrary to the intent of the legislation. *See Bowen*, 487 U.S. at 614-15, 108 S.Ct. at 2577. In addition, the Court found that the grantees were required to undergo evaluations before receiving funds, to make reports regarding the use of the funds, and to disclose the intended uses of the funds, which, taken together, provided a scheme sufficient to ensure that the government could prevent the funds from being used to support religion. *See id.*

Taken together, these cases establish that the government has a specific responsibility to ensure that any funding provided to religious institutions is never used to support the religious purposes of the institution. One of the primary ways the government can satisfy this requirement is through explicit restrictions on the use of the funds. Restrictive language, on its own, however, is not enough to meet the government's burden. The restrictions must be enforced in practice. The state must also ensure that the restriction extends for the life of the facility or other project funded by the government funds and that there are sufficient enforcement mechanisms in place to guarantee that the funds are never used to support the sectarian interests of the institution.

In this case, the defendants argue that the Lipscomb bond issue meets the above standards because the government funds were used only to support the secular educational purposes of the school. The evidence is otherwise; there were neither sufficient restrictions nor adequate enforcement mechanisms. In addition, even if Lipscomb used the funds in precisely the manner it stated it would, the government could not guarantee that the funds were being used solely for secular purposes. As

a result, the government funds provided to Lipscomb through the low-interest government loan from the Board cannot be found, as a matter of law, to have been limited to supporting only the secular interests of the school.

The Loan Agreement between Lipscomb and the Board does contain a restrictive use provision. Section 5.3 on "Special Covenants" states:

> (s) The Borrower will not use the Project or any part thereof for sectarian instruction or as a place of religious worship or in connection with any part of the program of a school or department of divinity for any religious denomination or the training of ministers, priests, rabbis or other similar persons in the field of religion.

(Docket No. 13, attach. Ex. 12 at 18) Under the Survival Clause of the Agreement, this restrictive use clause "shall survive termination or expiration of this Loan Agreement," anticipated to be in 2020. (Docket No. 13, attach. Ex. 12 at 23) In addition, the other contracts relating to the loan between Lipscomb, the Board, and Sovran Bank contain provisions incorporating the conditions and restrictions of the Loan Agreement. (Docket No. 13, attach. Ex. 13 at 2; *id.*, attach. Ex. 14 at 23; *id.*, attach. Ex. 17 at 11)

On its face, the language of this restriction is similar to that used in restrictions the Supreme Court has found adequate in limiting the provision of government funds to secular activities. As the Court has recognized, however, restrictive language alone is not sufficient; there must also be adequate enforcement of this restriction. In this case, there are two distinct problems with the use restrictions. First, the procedural mechanisms for monitoring and enforcing the sectarian use restriction do not meet the standards established by the Court. Second, the use restriction was not sufficient to ensure that the funds provided

by the loan were not used to support the sectarian interests of the school.

One of the primary problems with the enforcement comes from the effectiveness of the Board in removing itself from the details of the financial transaction. First, the Board assigned its entire interest in the Loan Agreement to the Trustee, Sovran Bank, and it is the Loan Agreement that contained the use restriction provision. (Docket No. 13, attach. Ex. 12) Banks, of course, are not generally required to comply with the First Amendment in their financial transactions. Second, even within the language of the Loan Agreement, the government abdicated any responsibility for enforcing the use restriction. Under the terms of the Agreement, the entity responsible for monitoring Lipscomb's adherence to the terms of the loan agreement is the Trustee of the bonds and loan, Sovran Bank. (Docket No. 13, attach. Ex. 12 at 21) The provisions on violations of the loan agreement provide:

> Section 6.1 *Event of Default Defined.* An Event of Default hereunder shall occur:
>
> . . .
>
> (b) If the Borrower shall fail to observe or perform any of its other covenants, conditions or agreements hereunder for a period of 30 days ***after notice*** (unless the Bank shall consent to an extension of such time prior to its expiration) ***specifying such failure and requesting that it be remedied,*** be given by the Issuer, the Bank or the Trustee to the Borrower.
>
> . . .
>
> Section 6.2 ***Remedies on Default.*** Upon the occurrence and continuation of an Event of Default, ***the Trustee shall immediately notify the Bank and***

may (except in a case of an Event of Default under Section 6.1(f), in which case the Trustee shall):

(a) ***With the written consent of the Bank***, declare all payments under the Note and the Bonds to be immediately due and payable in an amount sufficient to pay all the principal of an premium, if any, and accrued interest on the Bonds, whereupon the same shall become immediately due and payable.

(b) ***Take whatever action at law or in equity may appear necessary*** or desirable to collect the amounts then due and thereafter to become due hereunder or ***to enforce observance or performance of any covenant, condition or agreement of the Borrower*** under the Borrower Documents.

(Docket No. 13, attach. Ex. 12 at 20-21) (emphasis added) Clearly, the bank is responsible for monitoring Lipscomb's use of the funds to ensure compliance with the terms of the agreements.[26] Perhaps more importantly, the bank is given discretion in choosing what action to take, if any, if Lipscomb does violate a condition of the Loan Agreement. Thus, the use restriction language may appear to be absolute, but the enforcement mechanisms are not designed to ensure that Lipscomb will be prevented from using the funds to advance its religious mission.

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[26] In the Letter of Credit Reimbursement Agreement entered into by Lipscomb and Sovran Bank, Lipscomb is required to provide financial documents at the close of each fiscal year. (Docket No. 13, attach. Ex. 14 at 17-18) In addition, both the Chief Financial Officer of Lipscomb and a "responsible officer" of Lipscomb are required to provide affidavits stating that there have been no events of default during the previous year. *See id.*

Finally, the Survival Clause is not sufficient to ensure that Lipscomb will never use the facilities built with the government funds for sectarian purposes. In *Tilton,* the Court invalidated the portion of a federal statute that limited the government's interest in the facilities constructed under the grant to twenty years. In this case, Lipscomb has stated that the estimated useful life of the buildings constructed with the government loan is 40 years. (Docket No. 13, attach., Ex. 6 (D-1)) Of the $15 million loaned to Lipscomb, the University intended to use $11 million on the construction and renovation of these buildings. *See id.* The loan is scheduled to be repaid by 2020, after only thirty years. (Docket No. 13, attach. Ex. 5) Thus, the majority of the funds were used to construct and to renovate buildings whose useful life was estimated to be ten years longer than the life of the loan. The bank's interest in enforcing the terms of the Agreement will expire when the loan is repaid and the buildings are only 30 years old. Thus, there is no mechanism for enforcing the use restriction for the last ten years of the useful life of the improvements, assuming that a 40- year useful life is an accurate and reasonable estimation. In effect, Metro is providing Lipscomb with a contribution equal to the value remaining in the buildings after the loan is repaid in 2020. This directly conflicts with the Court's mandate that all use restrictions must remain in effect for the life of the buildings constructed with government funds.

The language of the use restrictions in the Loan Agreement appears, on its face, to comply with the standards set out by the Court, but the mechanisms in place to monitor and to enforce those restrictions does not rise to the level of an absolute separation. As a result, the court finds that the contractual agreements between the government and Lipscomb do not contain restrictions sufficient to guarantee compliance with the Establishment Clause.

ii. Use of Government Funds in Lipscomb's Stated Projects

The bond funds here were used in part to construct and equip a new library, to renovate and convert the old library into administrative offices, and to construct a new intramural athletics building ("or student activities center"), four new tennis courts, a new baseball stadium, an intramural field, and an addition to Lipscomb's Business Center. (Docket No. 197, Aff. Larry Cochran, para. 10) The evidence before the court indicates that many of these facilities may well be used, at least in part, to advance Lipscomb's religious mission.

The primary example of this mixed use is the new library constructed with government funds. People objecting to the bond issue pointed to the religious collections housed in Lipscomb's library and argued that providing financing for a new library would serve to advance the religious nature of Lipscomb. *See, e.g.*, App. A. While the court recognizes that a government-funded library may well contain a number of religious books without serving to advance religion in any way, there is a distinction between a library containing a general collection of religious materials as a small part of its collection and a library whose collection contains a substantial number of religious works which are largely dedicated to a particular faith. A former dean of Lipscomb, Norman L. Parks, objected to the government financing on precisely these grounds. In a letter to Metro Mayor Boner prior to the first bond issue in 1990, Dean Parks stated:

> The insistence that a library at Lipscomb is a purely secular enterprise is dishonest. Let me show you why. The Bible department enrolls every student at Lipscomb in a five-day [per week] Bible class throughout his four-year residence there. Any other department is a pygmy compared with this one. It follows that the library inescapably serve[s] the Bible

> department far more that it does any other department. Added to this is the fact that the Bible department offers a graduate degree in religion, the basis for the recent change in name from college to university. The library must house a vast collection of religion books to serve this graduate program. On top of that, plans for the library include special housing of a section relating to the history of the Church of Christ in America to include periodicals, books, manuscripts, church records, and the like on the model of the Disciples of Christ Historical Library in Nashville. Finally, the library will not house journals of other denominations.

(App. A; Docket No. 206, Deposition of William Hill Boner, attach. Ex. 6) As a former dean of Lipscomb and a non-party to this case, the court has no reason to doubt the veracity of Dean Parks' statements. In addition, the government funds were also used to "equip" Lipscomb's new library. "Equipping" the new library may well have involved the purchase of religious, perhaps even Church of Christ, literature, periodicals or other materials. *See* Docket No. 197, Aff. Larry Cochran, para. 10. Given these facts, the court must find that the use of government funds to construct a new library for Lipscomb advanced the religious teachings of the university.

Some of the bond loan funds also were used by Lipscomb to renovate the old library into administrative offices. Although the evidence does not contain a list of the current occupants of the new administration building, it is reasonable to infer that at least some whose offices are there are involved in the religious mission of the school. A number of the administrative offices have some responsibility for overseeing the daily Bible and chapel requirements and in hiring faculty members who adhere to the religious beliefs of Lipscomb. *See, e.g.*, Docket No. 209, attach., Ex. 16 at 8-9. It is entirely possible that administrative

offices dealing with the various religious programs and requirements of Lipscomb are housed in the newly renovated administrative offices. *See* Docket No. 197, Aff. Larry Cochran, para. 10.

Faculty offices are located in numerous buildings around campus, including in the Burton Administration Building, in the old library, and in the Business Center, all of which were renovated or remodeled with the government loan. (Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 26(A) at iii-v) These faculty members, including members of the Bible Department, are expected to use their offices to meet with students and to serve as advisors to both majors in their respective departments and to undeclared majors. *See id.* at 17-18. The faculty members also serve on a number of committees that have some functions relating to the religious nature of the school, including the Graduate Academic Review Committee, the Academic Advisory Committee, the Student Life Committee, the Graduate Admissions Committee, and the Graduate Council. *See id.* at xii-xix. It is reasonable to assume that at least some of this work will take place in the faculty members' offices, which could very well be located in the renovated library, the new library, or the renovated business center.

Lipscomb is proud to be unique in its overwhelming dedication to religious teaching in every aspect of its educational, faculty, and student life. As a result, government funds provided to Lipscomb must be carefully restricted and monitored to ensure that they are not supporting the sectarian interests of the school. In this case, there are not adequate assurances that the funds provided did not assist the religious interests of the school. More importantly, the Board and Metro did not create sufficient contractual restrictions or monitoring mechanisms to limit Lipscomb's use of the buildings and other improvements financed by the government loan. The Supreme

Court has allowed government funds to be directed to religious institutions, but only where the funds are used only to advance secular interests. Where, as in this case, the government has not provided effective limitations on the use of government funds, the court must find that the government's actions had the effect of advancing religion.

4. Endorsement Test

In addition to the guidance provided by the lines of cases examining aid to universities and aid to schools generally, there is one, final standard that the court will consider in determining whether the aid provided to Lipscomb constituted the impermissible advancement of religion in violation of the Establishment Clause: whether the government action conveys a message of endorsement of the religious activities of Lipscomb.[27] As the Court stated in *County of Allegheny v.*

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[27] In its Opposition to Plaintiffs' Motion for Summary Judgment, Lipscomb asserts that the question of governmental endorsement is not properly before the court based on Judge Nixon's prior determination that the plaintiffs did not have standing to assert an Establishment Clause claim on this basis. (Docket No. 260 at 4) Lipscomb argues that this alleged finding is the law of the case and "should be dispositive of the governmental indoctrination issue." (Docket No. 260 at 9).

The court does not agree with Lipscomb's interpretations. The doctrine of the law of the case does not preclude the court from using the endorsement test in deciding the merits of the plaintiffs' claim. Judge Nixon's findings regarding standing do not apply to determinations on the merits of the case. The question of the plaintiffs' standing has been finally resolved. *Steele v. Industrial Dev. Bd. of Met. Gov't of Nashville and Davidson Co.*, 39 F.3d 1182 (6th Cir.1994), *cert. denied, David Lipscomb Univ. v. Steele*, 515 U.S. 1121, 115 S.Ct. 2275, 132 L.Ed.2d 279 (1995). The endorsement test is not before the court as a basis for standing but as one test utilized by the Court in determining whether a governmental action has the primary effect of advancing religion in violation of the Establishment Clause.

American Civil Liberties Union Greater Pittsburgh Chapter, "In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence." 492 U.S. 573, 592, 109 S.Ct. 3086, 3100, 106 L.Ed.2d 472 (1989) (plurality opinion, opinion of the Court, Part III A) (citing *Engel v. Vitale,* 370 U.S. 421, 436, 82 S.Ct. 1261, 1270, 8 L.Ed.2d 601 (1962)); *see also Rosenberger v. Rector and Visitors of the Univ. of Virginia,* 515 U.S. 819, 841-42, 115 S.Ct. 2510, 2522-23, 132 L.Ed.2d 700 (1995); *Lee v. Weisman,* 505 U.S. 577, 627, 112 S.Ct. 2649, 2676, 120 L.Ed.2d 467 (1992)(Souter, J., concurring); *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 8-9, 109 S.Ct. 890, 896, 103 L.Ed.2d 1 (1989) (plurality opinion); *Edwards v. Aguillard,* 482 U.S. 578, 593, 107 S.Ct. 2573, 2582, 96 L.Ed.2d 510 (1987); *Wallace v. Jaffree,* 472 U.S. 38, 60, 105 S.Ct. 2479, 2491, 86 L.Ed.2d 29 (1985). In addition, the Sixth Circuit has specifically adopted the endorsement test for determining whether a government

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Second, the law of the case is a discretionary rule of practice rather than a binding procedural doctrine. *See United States v. United States Smelting, Refining & Mining Co.,* 339 U.S. 186, 199, 70 S.Ct. 537, 545, 94 L.Ed. 750 (1950); *see also Southern Ry. Co. v. Clift,* 260 U.S. 316, 319, 43 S.Ct. 126, 126-27, 67 L.Ed. 283 (1922). In *Miles v. Kohli & Kaliher Assoc., Ltd.,* the Sixth Circuit found that the doctrine "is not an 'inexorable command,' and will not preclude reconsideration of issues when substantially new evidence has been introduced, when there has been an intervening change of law, or when the first decision was clearly erroneous and enforcement of its command would work substantial injustice." 917 F.2d 235, 241 & n. 7 (6th Cir.1990). Judge Nixon issued the Memorandum on plaintiffs' standing July 16, 1992. (Docket No. 82) A substantial amount of evidence has been added to the record since that time, and interpreting Judge Nixon's decision as precluding consideration of the endorsement test would work a substantial injustice.

For these reasons, the court finds that Lipscomb's argument is without merit.

action has the impermissible effect of advancing religion. *See Brooks v. City of Oak Ridge*, 222 F.3d 259, 264 (6th Cir. 2000) ("When evaluating the "effects" prong of the *Lemon* test, this court applies the endorsement test, which was embraced by the Supreme Court in *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989)."); *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1543-44 (6th Cir.1992) (en banc).

Under the endorsement test, "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 691-92, 104 S.Ct. 1355, 1369, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring). In application, the "endorsement test requires careful and often difficult line-drawing and is highly context specific . . . ." *County of Allegheny*, 492 U.S. at 631, 109 S.Ct. at 3121 (O'Connor, J., concurring). As a result, "every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch*, 465 U.S. at 693-94, 104 S.Ct. at 1370 (O'Connor, J., concurring). As Justice O'Connor has noted,

> The Clause is more than a negative prohibition against certain narrowly defined forms of government favoritism . . . ; it also imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message. That is, the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.

Pinette, 515 U.S. at 777, 115 S.Ct. at 2454 (O'Connor, J., concurring in part and concurring in judgment).

Because the endorsement test is concerned with the message conveyed to average citizens by governmental action, the examination "necessarily focuses upon the perception of a reasonable, informed observer." *Capitol Sq. Rev. and Advisory Bd. v. Pinette,* 515 U.S. 753, 773, 115 S.Ct. 2440, 2452, 132 L.Ed.2d 650 (1995) (O'Connor, J., concurring in part and concurring in judgment); *see also Pinette,* 515 U.S. at 787, 115 S.Ct. at 2458-59 (Souter, J., concurring in part and concurring in judgment) ("Effects matter to the Establishment Clause, and one, principal way that we assess them is by asking whether the practice in question creates the appearance of endorsement to the reasonable observer."); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 348, 107 S.Ct. 2862, 2875, 97 L.Ed.2d 273 (1987) (O'Connor, J., concurring in judgment) ("To ascertain whether the statute conveys a message of endorsement, the relevant issue is how it would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute.").

In *Americans United,* the Sixth Circuit, sitting en banc, considered whether a private religious group receiving a permit to display a menorah during Chanukah in a public plaza would convey a message of endorsement. *See* 980 F.2d at 1539-40, 1543-44. In making that determination, the court "adopt[ed] the perspective of a reasonable observer." *Id.* at 1543. The court explained this perspective:

> We wish to emphasize that the endorsement test creates an objective standard, similar to the 'reasonable man' standard of tort law or the 'reasonable person knowing all the relevant facts' who judges judicial disqualification under 28 U.S.C. § 455. *Roberts v. Bailar,* 625 F.2d 125 (6th Cir.1980). Accordingly, we do not ask whether there is any person who could find an endorsement of religion,

> whether some people may be offended by the display, or whether some reasonable person might think Grand Rapids endorses religion. Instead, we ask whether the reasonable observer would conclude that Grand Rapids endorses religion by allowing Chabad House's display.

Id. at 1543-44 (internal footnote omitted). Inorder to determine what the reasonable observer would conclude in a given situation, the Sixth Circuit found that a court "must examine all the relevant facts, consider carefully the amount of weight to give each fact, and be careful to treat religious displays fairly." *Id.* at 1544. As a result, this court looks to the messages conveyed and the information provided to the general public by Lipscomb regarding its religious beliefs and by the Board in considering and approving the Lipscomb bond issue. Libscomb's statements regarding its overwhelmingly religious nature can be found in its brochures, catalogs, press releases, web site, and handbooks. *See, e.g.,* Apps. B-F. These items have been discussed in the preceding sections, so the court will focus its attention on information provided by the defendants to the public that indicates the relationship between them and the degree to which the government does or does not support the religious views of Lipscomb.

In this case, the best source of information on which the reasonable observer may rely in determining whether the issuance of tax-exempt revenue bonds by the Board was an endorsement of religion is the Official Statement released by the Board and Lipscomb in connection with the 1991 Bond Re-Issue. In large, bold type on the first page of the Official Statement accompanying the bond issue, the following appears:

**The Industrial Development
Board of the Metropolitan Government
of Nashville and Davidson County (Tennessee)
$15,000,000
Educational Facilities Revenue Refunding Bonds
(David Lipscomb University Project), Series 1991**

(Docket No. 1, attach. Ex. D) On initial observation, the reader would clearly connect the Board to Metro and both to the project benefitting David Lipscomb University. The Official Statement then describes the Board as the Issuer and explains the relationship between the Board and the revenue bonds being issued for the benefit of Lipscomb. *See id.* at 1-4. The Board, which prepared the section describing its powers and function, states clearly that it is "an instrumentality of The Metropolitan Government of Nashville and Davidson County." *See id.* at 4. The Official Statement is organized in a manner that places the government's role first and then describes the university, the project, and the uses of the funds provided through the bond proceeds. *See id.* at 1-26.

The description of Lipscomb provided in the Official Statement details its religious ties and affiliation in significant detail. In this description, Lipscomb states:

> As stated in its 1990-1991 school catalog, the supreme purpose of the University is 'to teach the Bible as the revealed will of God to man and as the only and sufficient rule of faith and practice, and to train those who attend in a pure Bible Christianity.' To help fulfill this purpose, each regular student must be enrolled in a Bible class each school day and also attend daily chapel services. The daily Bible classes are taught in a classroom setting under a curriculum designed to give a broad coverage of every book in the Bible in four years. The daily chapel periods, of

> approximately 20 minutes in length, usually consist of a devotional period of approximately 15 minutes, with the balance of the time used for announcements and other school business. The original land grant of the campus to the predecessor of the University required as a condition of the grant that there be daily Bible classes for all students.

(Docket No. 1, attach. Ex. D at 21) In addition, Lipscomb states that the majority of its students are members of the Churches of Christ and that "[a]ll members of the faculty and administration (other than certain visiting professors) and all members of the Board of Directors of the University are, and must be, members of a Church of Christ." *See id.* at 20, 22. Further, Lipscomb states that its mission, as contained in its strategic plan, is "to serve its students so that they may master knowledge and skills appropriate to them and become Christlike in attitude and behavior." *See id.* at 21. Lipscomb also includes the list of "objectives to which the University and its faculty have made a commitment," *see id.* at 22-23, which can be found in Appendix C to this opinion.[28] Finally, the description states that "[s]tudents are expected . . . to observe biblical standards of conduct . . . ." and that the university has rules prohibiting "the conduct of religious services on campus by females." *See id.* at 22. Lipscomb admits that the latter might constitute sex discrimination under Title IX, but the university has obtained exemptions for such positions as based on the "religious tenets" of the university. *See id.* Taken together, this description shows Lipscomb to be a strictly religious school whose primary mission is to teach the values and beliefs of the Church of Christ.

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[28] The Objectives included in the Official Statement contained only the listed items, without the further discussion included in the Faculty Handbook, as found in Appendix C.

The structure and content of the Official Statement indicates to the reasonable observer that the Board, as an instrumentality of Metro, is endorsing the sectarian beliefs and teachings of Lipscomb University. In *Rosenberger,* the Court found that a disclaimer from the University, as the government actor, provided significant evidence that there was no government endorsement, even though the University was providing funding to assist a religious organization. *See* 515 U.S. at 841, 115 S.Ct. at 2523 ("In this case, 'the government has not fostered or encouraged' any mistaken impression that the student newspapers speak for the University . . . . The University has taken pains to disassociate itself from the private speech involved in this case."). No such disclaimer appears here.[29] As a result, there is nothing to indicate to the reasonable observer that the government is not entirely endorsing the religious views espoused by Lipscomb in the Official Statement.

III. CONCLUSION

The defendants have raised no genuine issue of material fact as to the nature and beliefs of Lipscomb. The evidence shows that Lipscomb is pervasively sectarian and that its secular functions as an educational institution cannot be separated from its religious mission. The government, through the Board and Metro, chose to provide financial assistance to a sectarian institution without sufficient guarantees that the funds would be used solely to support secular functions of the school. This aid by the government created the perception of government endorsement of the religious views and teachings of David Lipscomb University. As a result, issuance of tax-exempt bonds and the loan of the proceeds of those bonds to

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[29] In the final "Miscellaneous" section, the Board, as Issuer, disclaims only liability for any inaccuracy or incompleteness of any information not provided by the Board. (Docket No. 1, attach. Ex. D at 36-37)

Lipscomb had the impermissible effect of advancing the religious beliefs of the aided institution, in violation of the Establishment Clause of the First Amendment. Consequently, the defendants' motions for summary judgment will be denied and the plaintiffs' motion for summary judgment will be granted against all defendants.

The relief granted to the plaintiffs will be that requested in the Complaint. (Docket No. 1 at 24-25) A permanent injunction will issue prohibiting the Industrial Development Board and Metropolitan Government from issuing additional tax-exempt bonds to Lipscomb or bonds to any other pervasively sectarian institution. The plaintiffs shall be awarded $1.00 each as nominal damages and their attorney's fees pursuant to 42 U.S.C. § 1988.

An appropriate Order will enter.

Enter this 24th day of October 2000.

/s/ Aleta A. Trauger
ALETA A. TRAUGER
United States District Judge

APPENDIX A

404 Minerva Drive
Murfreesboro, Tn. 37130
April 17, 1990

Mayor Bill Boner
Nashville, Tn.

Dear Bill,

Perhaps you remember me from your Murfreesboro days at MTSU. I am an alumnus of David Lipscomb, its dean for eight years, and I support it financially, and my children attended school there. Still I am solidly opposed to the issuance of Metro industrial bonds to build a library building at the institution because it is a religious corporation and such financial aid is in direct violation of the Constitution's rule that government shall make no law respecting (that is, having anything to do with) an establishment of religion.

The insistence that a library at Lipscomb is a purely secular enterprise is dishonest. Let me show you why. The Bible department enrolls every student at Lipscomb in a five-day [per week] Bible class throughout his four-year residence there. Any other department is a pygmy compared with this one. It follows that the library inescapably served the Bible department far more that it does any other department. Added to this is the fact that the Bible department offers a graduate degree in religion, the basis for the recent change in name from college to university. The library must house a vast collection of religion books to serve this graduate program. On top of that, plans for the library include special housing of a section relating to the history of the Church of Christ in America to include periodicals, books, manuscripts, church records, and the like on the model of the Disciples of Christ Historical Library in Nashville. Finally, the library will not house journals of other

denominations. Lipscomb's catalog declares that the religious approach is made in every department, whether biology, chemistry, or geography, and the library books are chosen to reflect this perspective. If you examine the corporation charter of Lipscomb, you will find that makes Lipscomb a religious corporation. No person can be employed at Lipscomb who is not a member of the mainline Church of Christ. He cannot be a premillennialist or believe that instrumental music is acceptable for worship of God. He must believe that a divorced person cannot remarry and continue in church. He must believe that a woman cannot teach a class in religion to men.

I urge you, out of respect for the Constitution that you do not give assent to the issuance of $15,000,000 in tax-free bonds, worth two to three percent per year, to finance the proposed Lipscomb library.

Sincerely,

/s/ Norman L. Parks /s/
Norman L. Parks

(Docket No. 206, Deposition of William Hill Boner, attach. Ex. 6).

APPENDIX B

(from Faculty Handbook, David Lipscomb University, 1989-90)[30]

PART II

THE HERITAGE

The present Board of Directors and administration of David Lipscomb University are dedicated to maintaining the original purposes of the university as stated in the preceding Part I of this handbook.

It is imperative that those of us who devote our strength to the work of the university understand and share the convictions which brought it into being. This is especially true in view of the fact that many of the spiritual problems which prevailed in 1891 exist today.

The history of higher education in the United States reveals that many religious groups have founded schools to offset secularism and promote their interests. It is sobering to realize that few of these schools have completed even one century in loyalty to their original purposes. This tragic denial of founding ideals must not befall David Lipscomb University.

The early decades of the nineteenth century witnessed the rise of that religious movement known as the Restoration. The conviction grew in many quarters that a basis for unity could be

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[30] According to the first page of the Faculty Handbook, it includes official statements of regulations for the faculty of David Lipscomb University. The faculty handbook is binding upon each member of the faculty and staff and becomes a part of the contractual agreement between employees and the university. The provisions of the handbook are superseded only by the provisions of the bylaws of the Board of Directors and/or decisions made by the Board.

(Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 26(A) at i)

found in accepting the Bible as the full and final revelation of God to man and as the only sufficient rule of faith and practice in religion. The determination to settle all spiritual questions by an appeal to Scripture, and a willingness to be bound by anything taught in the Book, became the single most distinguishable feature of the movement.

The restoration principle continues to have relevance in every generation. Each person involved in this effort must accept the responsibility and privilege of examining any issue in the light of it. Any unwillingness to go to the Bible to determine truth; any acceptance of brotherhood standards as the basis of authority; and any reluctance to face any issue in the light of this approach are denials of the spirit which brought this school into existence. The questions, problems and issues change through the years; the need to seek solutions in the revelation of God and goodwill toward man does not change.

In 1888, James A. Harding and David Lipscomb, two Christian scholars, agreed to combine their abilities to build an institution that would continue to promote the restoration principle. They concluded that this could best be done by founding a school whose purpose was to teach the Bible as a central part of its curriculum. From its beginning a great host of Christians shared the convictions of the founders and contributed both as congregations and as individuals to make possible the school's existence. From then until now members of the churches of Christ have supported the school with both students and money.

Through the years some basic conditions and commitments have distinguished David Lipscomb University from many other institutions. A prerequisite for membership on the faculty is loyalty to New Testament Christianity as understood and traditionally practiced among churches of Christ. This includes complete and unwavering acceptance of the Bible as the

divinely inspired word of God; faithfulness in personal life to those ideals and habits which contribute to purity and opposition to the various forms of worldliness; and active participation in the work of a local congregation. Acceptance of a position on the faculty is considered a commitment to these principles. Opposition to them either in teaching, personal life, or influence would have to be judged a violation of the contract between a teacher and the university. A clause to that effect is inserted in the contract of every teacher.

Within the scope of these basic commitments, Lipscomb is dedicated to quality education--to building the very best university of liberal arts that we are capable of building. This university is obligated to higher learning and to standards of scholarship. The motto of David Lipscomb University is this: "Ye shall know the truth, and the truth shall make you free." The entire concept of education at Lipscomb is based on firm convictions concerning this statement.

These convictions are:

1. That there is eternal truth--a rejection of moral relativism.
2. That this truth can be learned and relied upon.
3. That truth is consistent throughout the universe.
4. That there is not, and cannot be, any conflict between truth in religion, and truth in any other field. Where such conflict seems to exist, human understanding is in error.

Another fundamental part of the heritage with which we have been entrusted is the concept that final authority in all matters rests with the Board of Directors. David Lipscomb University differs from a publicly-supported institution which logically reflects the ideals and purposes of the public to which

it belongs; it is rather the embodiment of certain principles which are offered to the public as a special type of education. No attempt can be made to bring the university into conformity with the standards of others, for to do so would fundamentally alter the nature of the institution. This necessarily means that the Board of Directors has constant responsibility to plan and guide the activities of the institution in the light of its own purposes; to make all decisions in matters of fundamental policy; and to see to it that the university remains loyal to its historic objectives, both in theory and in practice. The control of the institution, therefore, cannot be turned over to any group other than its Board, whether administration, faculty, students, alumni, or patrons.

An insistence on excellence of academic work is also a distinguishing feature of the Lipscomb heritage. Since the cause we serve is *Christian* education, we dare not be content with inferior quality in such an undertaking. This requires on the part of the faculty continued self-evaluation to determine whether we are actually making the preparation and conducting ourselves in the classroom in keeping with the name of Christ; it also demands of every student the highest level of achievement of which he/she is capable. To permit students to pass without effort or by the effort of others; to bring upon ourselves just criticism for mediocre performance of our duties; or to encourage idleness or below-standard work by our indifference is to fail to "work with all (our) heart, as working for the Lord."

The faculty of David Lipscomb University has shared the joy of service since the first term in 1891. Those who have taught here have done so because they were convinced that they could accomplish good for man while serving God. Faithfulness to this trust requires unselfish devotion to young people and to the Lord and the ability to find satisfaction in this

work. To do otherwise would be unworthy of the sacrifices of those who have gone before.

This heritage we receive, not merely as an expression of the uniqueness of the institution but as a dedication to all who will come after us. It is our privilege to work with pride in these principles in the name of our Lord and to pass on to succeeding generations the ideals which give to David Lipscomb University its reason for existence.

(Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 26(A) at 5-6)

APPENDIX C

(from Faculty Handbook, David Lipscomb University, 1989-90)[31]

PART I

WHY DAVID LIPSCOMB UNIVERSITY?

The continuing and increasing emphasis on publicly-supported education inevitably raises the question, Why David Lipscomb University? This matter is especially significant for those who comprise the faculty, for justification of the existence of the university is also justification for every effort put forth by each individual associated in its work.

Education has meaning because "the mind of man is the candle of the Lord." To assume that the training of young people deals exclusively with those mental processes by which they learn facts and arrive at conclusions is tragically shortsighted. History has taught us that education alone is no panacea for the problems that plague mankind. It is only as men's minds are undergirded with principles of righteousness, guided by worthy purposes, and dedicated to the service of men and the glory of God that education serves its true purpose. This is the reason David Lipscomb University exists.

The mission of David Lipscomb University is to serve its students so that they may master knowledge and skills appropriate to them and become Christlike in attitude and behavior.

It must be kept firmly in the consciousness of all connected with the institution--administration, faculty, students, and patrons--that Lipscomb is a *Christian school.* In the original appeal for support, written by David Lipscomb, it was made

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[31] *See supra,* note 30.

clear that the Bible was to be the foundation upon which all else would center:

> The supreme purpose of the school shall be to teach the Bible as the revealed will of God to man and as the only and sufficient rule of faith and practice, and to train those who will attend in a pure Bible Christianity, excluding from the faith all opinions and philosophies of men, and from the work and worship of the church of God all human inventions and devices. Such other branches of learning may be added as will aid in the understanding and teaching of the Scriptures and as will promote usefulness and good citizenship among men.

This purpose was further set forth in the deed conveying the property on Spruce Street for the use of the school as follows:

> . . . that the property shall be used for maintaining a school in which, in addition to other branches of learning, the Bible as the recorded will of God and the only standard of faith and practice in religion, excluding all human systems and opinions and all innovations, inventions, and devices of men from the service and worship of God, shall be taught as a regular daily study to all who shall attend said school and for no other purpose inconsistent with this object. The condition being herein inserted at the request of the founders of the proposed Bible School, the same is hereby declared fundamental and shall adhere to the premises conveyed as an imperative restriction upon their use so long as the same shall be owned by said Bible School, or its Trustees, and to any and all property which may be purchased with the proceeds

of said premises in case of sale or reinvestment, as hereinafter provided.

David Lipscomb University is not, therefore, merely an institution which requires every student to take a lesson in the Bible each day; this study is the wellspring from which the university issued.

This basic principle applies also to the other distinguishing features of the institution. Daily chapel worship, the purposeful direction of every activity to the glory of God, opposition to worldliness, and the provision of a carefully controlled environment are essentials which compose the very warp and woof of the university. Any compromise or surrender of these commitments would leave no logical justification for the existence of the institution. They are received by us in sacred trust from all who have labored to make possible the campus we enjoy, and must be passed untarnished to those who will come after us. How faithfully we discharge this trust will determine our continuing ability to stand as an institution of peculiar purposes and holy aspirations. If we should fail, the university would lose its identity and become only another small unit in the vast complex of mass education.

Within this framework, the specific objects to be sought have been stated by the faculty and administration as follows:

Objectives

1. To provide the very best in a Christian liberal arts education under the direction of Christian teachers in a distinctively Christian environment.

   David Lipscomb University is committed to the highest standard of scholarship and at the same time is dedicated to the building of Christian character as the ultimate goal.

2. To equip the student to communicate clearly, logically, and effectively through reading, writing, speaking, and listening.

   David Lipscomb University realizes that the mastery of the skills of communication is an important asset in any field of work as well as in all human relations, and that it is of supreme importance to the work of spreading the kingdom of God.

3. To give the student a basic economic understanding and ability to choose a vocation that will make the best use of his/her talents in earning a living and in serving God and his/her fellowman.

   David Lipscomb University believes that a Bible-centered liberal arts education is the best general preparation for any business or profession. Special training in a chosen field becomes more meaningful when based on this foundation, and the person thus educated is better able to take his/her place in a democratic society as a responsible, free citizen.

4. To encourage the development of an appreciation for the beautiful.

   David Lipscomb University strives for this positive approach to the development of high ethical and moral principles: to lead the minds of students in the direction of "whatever is true, whatever is noble, whatever is right, whatever is pure, whatever is lovely, whatever is admirable," as Paul urges in Philippians 4:8. The completely educated man or woman would be able to appreciate the finest in music, art, literature, and

nature as well as the true beauty of spiritual goodness.

5. To train future leaders in the church.

   David Lipscomb University recognizes and endeavors to measure up to its responsibility as a Christian liberal arts university to train future preachers, teachers, song leaders, elders, deacons, and other leaders who will put the work of the Lord's church first in their lives, regardless of whether their chosen profession is law, medicine, a business career, preaching, teaching, singing, or any other work or vocation.

6. To train future leaders in all honorable professions and vocations.

   David Lipscomb University further recognizes its responsibility as a Christian liberal arts university to provide Christian leadership for all honorable professions and vocations. One of Lipscomb's most cherished goals is to see dedicated Christians of outstanding ability and talent placed in high positions of leadership in all such occupations.

7. To develop socially responsible citizens.

   David Lipscomb University seeks to equip its students with a basic knowledge of American institutions which deal with our historical, political, social, scientific, and religious heritage; to produce good citizens concerned with perpetuating the best in our American tradition and democratic was of life; and, with an awareness of changing world conditions, to produce leadership in the promotion of civic,

national and international understanding and goodwill.

8. To prepare young men and women for their future roles as builders of the home, as husbands and wives, and as fathers and mothers.

David Lipscomb University considers no phase of life preparation more important than the training for a successful partnership in a happy home life. Complete education requires such preparation.

9. To stimulate intellectual curiosity.

David Lipscomb University earnestly strives to create within its students an inquisitive mind and desire to know. While providing an introduction to scholarly habits and pursuits, Lipscomb seeks to inspire each student with an eagerness to learn, a determination to achieve and a devotion to truth consistent with the principle: "Ye shall know the truth, and the truth shall make you free."

10. To hold up Christ as the example to follow in every field of activity, in elementary, middle, high school, and in the university, as well as later in life.

David Lipscomb University has established as the sure criterion for students in formulating standards of conduct, on the campus and off, an honest answer to this question: "Is this what Jesus would have me do?"

(Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 26(A) at 1-3)

APPENDIX D

(from Faculty Handbook, David Lipscomb University, 1989-90)[32]

PART IX

FACULTY AND STAFF MEMBERS AS MODELS AND EXAMPLES

The highest level of professional behavior is expected from each member of the university faculty. Each is expected to exemplify in personal habits and manner of life the very best in Christian example.

Every faculty member is bound by contractual agreement as a basic condition for employment with the university to "conscientiously and actively support in teaching, and in personal life, the academic and religious policies of David Lipscomb University as interpreted and announced by the Board of Directors and/or the administration."

This contractual agreement requires that every member of the faculty be a faithful member of the church. The principle of serving as good Christian examples before students requires that each faculty member also be active in good works and church-supported programs.

Regular attendance at worship services and Bible studies is necessary for proper Christian growth. Faculty members are expected to encourage students directly and by example to attend the regular services of a local congregation.

It is this principle of serving as examples before students which causes the university to refuse to employ faculty members who use tobacco, alcohol or drugs. Neither do we

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[32] *See supra,* note 30.

wish to have faculty members who engage in activities that might be considered worldly by others.

By this same principle, we expect faculty members to present modest taste in all wearing apparel. Male members of the faculty are requested to wear coats and ties and refrain from casual dress. Female members of the faculty are also asked to wear appropriate dresses, suits and other professional attire.

This same principle prevents the university from employing divorced persons. We realize that there are divorces accepted by churches of Christ. However, we also believe that God never planned divorce as the best situation for any Christian.[33]

The above specific items clearly indicate the university's high expectation regarding faculty conduct and example. This has been true throughout the history of the university.

It is obviously impossible to provide details for all situations that might arise under this principle. Any faculty member with a question or suggestion in regard to this basic principle should feel free to discuss the matter with the university administration.

(Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 26(A) at 61)

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[33] This paragraph was deleted from Part IX of the Faculty Handbook in the 1990-91 edition. (Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 26(B) at 49)

APPENDIX E

(excerpts from Faculty Handbook, David Lipscomb University, 1989-90)[34]

PART III

ORGANIZATION AND GOVERNMENT

. . .

Christian Government for a Christian University

The operative principle in a Christian university community is mutual respect and trust. It is assumed that all members of this community will respect policies and regulations and will act as responsible individuals.

Students in this Christian environment must recognize the responsibility the university has assumed for their welfare and must also accept the guidance and supervision that accompanies such responsibility. Those who are in positions of authority must have the responsive cooperation of those for whom they are responsible. Oversight and responsibility are inseparable.

It is expressly understood that each student applying for admission to any division of Lipscomb and each faculty and staff member employed thereby accepts these fundamental principles as a condition of admission or employment.

The work of the Board of Directors is to establish basic principles for the operation of the university; the president, administrative officers, faculty, and staff, working together, implement the decisions of the Board; and the students are encouraged to study, learn, and grow in the environment which

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[34] *See supra,* note 30.

is provided. Each must work in his/her own sphere. When this is done, the good of all is served.

Christian Education at David Lipscomb University

Christian education requires self-discipline in the areas of personal behavior, academic scholarship, and participation in campus life. Ideally it is a holistic process that facilitates competent self-direction in preparation for adulthood. It presumes respect for instruction and supervision and the development of a strong sense of individual responsibility.

The basic concept of Christian education at David Lipscomb University includes a sincere interest in the total life of each student as an individual person. Lipscomb genuinely cares about what each student attending this institution at any level thinks, believes, or does. Christian education as understood here is dedicated to placing in the hearts, minds, and lives of young people all that God has revealed in the Bible and the very best that man has learned, discovered, or experienced during his sojourn on this planet.

While David Lipscomb University will encourage every student to think and to believe what the university understands to be good and right, no student can be required to think or to believe any particular thing. Faith is based on personal conviction which cannot be legislated or forced upon any person. This is not in any sense the same as saying that Lipscomb has no interest in what the young people here think and believe. It is intended to say that the only control over what students think and believe must be exercised through teaching and example.

In contrast, the university does have the prerogative to control what can and cannot be done on this campus and what can and cannot be done by any student enrolled. Accordingly, each student specifically and affirmatively agrees to abide by

the regulations and requirements of David Lipscomb University as a condition of admission.

Each student has the unquestioned right to decide whether to attend Lipscomb or not. Those who decide to apply for admission to Lipscomb thereby accept the standards, regulations, and requirements of the university. This principle is a cornerstone in the successful operation of a Christian university. . . .

(Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 26(A) at 7-8)

APPENDIX F

(excerpts from Brochure of David Lipscomb University)

. . .

"In favor with God" is at the heart of every program and activity at Lipscomb University. Lipscomb is one of the few universities where faculty and students assemble for a few minutes each day to sing praises to God and study the Bible. In classes the Bible is taught simply as the inspired, revealed word of God to man. But these organized activities are only a small portion of the spiritual emphasis of Lipscomb.

Spontaneous, student-led devotionals, as well as weekly outdoor devotionals, create a spiritual atmosphere rarely experienced in a university environment. Interested students participate in many extracurricular activities that contribute directly to this spiritual atmosphere: singing at nursing homes, tutoring underprivileged children, providing meals for the homeless, working with Special Olympics, or actively preparing for mission work.

From the moment a new student steps on the campus, he or she recognizes that Lipscomb is distinctive. Caring faculty and friendly students respond in ways that reflect the university's commitment to educating the whole person. Bible classes not only teach more about God's will but also give each student the opportunity to develop his or her own personal relationship with the Lord.

The Lipscomb University student body is a unique blend of backgrounds, interests, and personalities. One common thread that binds students together is their commitment to Christ. At Lipscomb a student's love for the Lord is strengthened by this special association with other students, the majority of whom share the same spiritual values.

(Docket No. 209, Deposition of Harold Hazelip, attach. Ex. 25)

FILED
JAN 17 2003

Nos. 02-737 & 02-936

IN THE

Supreme Court of the United States

Harold E. Steele *et al.*,

Petitioners,

v.

David Lipscomb University *et al.*,

Respondents.

Metropolitan Government of Nashville and Davidson County,

Cross-Petitioner,

v.

David Lipscomb University *et al.*,

Cross-Respondents.

On Petition and Conditional Cross-Petition for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION OF DAVID LIPSCOMB UNIVERSITY

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RULE 29.6 STATEMENT

Respondent David Lipscomb University has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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STATEMENT

Petitioners contend that, because respondent David Lipscomb University is not merely an excellent educational institution but one infused with the teachings of God, it is uniquely forbidden from receiving equal treatment under the law. The federal tax code has long permitted entities that further important social interests to receive financing for capital improvement projects through tax-free industrial revenue bonds issued by private banks and purchased by private individuals. The government's substantial interest in making this financing available to Lipscomb is plain from the University's indisputable track record of academic excellence, which the petition for certiorari omits. The court of appeals was thus clearly correct to recognize that the even-handed availability of tax-free bond financing is not a threat to the principles of the Establishment Clause of the First Amendment, but rather is essential to the government's interest in furthering the education of the citizenry while both remaining neutral towards religion and respecting the free exercise of religious freedoms.

I. Introduction to David Lipscomb University

A. Early History

David Lipscomb and James A. Harding established Lipscomb University as the Nashville Bible School on October 5, 1891. Despite their choice of name for the institution, both men were eager to extend to an underserved region the type of education they had received – a broad-based liberal arts curriculum presented in a Christian context. Each man was well educated for his day. Lipscomb was an 1849 graduate of Franklin College, located in Nashville and the largest college in Tennessee at the time. Franklin emphasized agriculture, but its faculty taught traditional liberal arts subjects. Lipscomb studied Latin, Greek, botany, navigation, surveying, and mental and moral philosophy. Harding graduated in 1869 from Bethany College in Bethany, West Virginia, a lib-

eral arts college whose graduates gave birth to such institutions as Butler University, Culver-Stockton College, and Texas Christian University. Franklin College and Bethany College included Bible instruction as part of their broader curricula, and Lipscomb and Harding held that Bible study was foundational to academic preparation for any career choice or life pursuit.

In founding the Nashville Bible School, Lipscomb wrote, "The supreme purpose of the school shall be to teach the Bible as the revealed will of God to man * * * and to train those who attend in a pure Bible Christianity. * * * Such other branches of learning may be added as will aid in the understanding and teaching of the Scriptures and as will promote usefulness and good citizenship among men." Harding articulated the school's design as being "to train males and females, young and old * * * for the greatest usefulness of life," and asserted the founders' academic goals: "We aspire to stand in the front ranks of the great educational institutions of the world." A medical doctor from the University of Tennessee was retained to teach the sciences in the school's second year. By the mid-1890s the school was noted for its classical education and emphases in Greek and Latin. The founders emphasized in course catalogs the school's openness to all students, its integration of spiritual exploration and academic excellence, and suggested opposition to the notion of their school as seminary. "We propose to present in the way of a liberal education as extensive a curriculum as can be found in any school, college, or university in the land, and at the same time to thoroughly drill its students in the Bible, the divine source of wisdom and goodness. It was not our design to make professional preachers, but to train males and females, young and old, all who might become members of the school, for the greatest usefulness in life. Each student is left to choose his own calling." Catalog, 1896-97.

With the turn of the century, the school took on the broader scope of a small college. Literary societies appeared,

offering competition among students in academic matters such as debate, oratory, and declamation. Alumni attested anecdotally to the validity of the school's educational concept. Batsell Baxter, who later served as president of three universities, including Pepperdine University, said, "After leaving the Nashville Bible School in 1911, I attended in turn three universities. I was agreeably surprised to learn that the instruction received in the Nashville Bible School was as thorough and efficient as the best of instruction in these more pretentious institutions of learning."

B. Association with Churches of Christ

Lipscomb and Harding were associated with a fellowship that was becoming known in the late nineteenth century as the Churches of Christ. The Churches of Christ were among three groups that emerged from the American Restoration Movement, which coalesced in 1832 from independent efforts led by men from North Carolina to New England. These leaders believed that divisions among believers in Jesus Christ resulted from creeds that dominated institutional churches. The common belief was that restoring unity among believers could only be accomplished by returning to the Bible, "excluding all human opinions and philosophy, as the only rule of faith and practice," as Lipscomb explained. Despite the attractiveness of this call to many, divisions asserted themselves in the mid-nineteenth century. By the time the Nashville Bible School was established, the Disciples of Christ, the Independent Christian Church, and the Churches of Christ were emerging as distinct identities. Churches of Christ generally held more closely to the ideals of conforming to the New Testament in all congregational practices, subordinating the goal of unity to the goal of strict restoration. Harold Hazelip, *Churches of Christ*, in *Tennessee Encyclopedia of History and Culture* (1998). Churches of Christ

> accept much of mainstream historical orthodoxy as Biblical. Their view of human knowledge of God is that God reveals himself primarily in scripture, ultimately in Christ,

but also in nature. The Bible is accepted as entirely trustworthy. They understand God in Trinitarian terms – as Father, Son, and Holy Spirit. [This view is harmonious with the first four 'ecumenical' councils of the first 500 years A.D. These councils centered on the nature of Christ before and during the Incarnation, and the nature of God as Trinity.] They believe God created everything that exists *ex nihilo*. Evil entered the human experience through the fall of Adam and Eve; original (inherited) sin is not accepted. Jesus is understood to be both God and man; His death accomplished sacrificial atonement for all human beings who genuinely trust in Him. The Christian hope is for eternal life in heaven; eternal punishment is a reality as well.

Hazelip, *supra*.

In addition to congregational autonomy, Churches of Christ are distinguished by *a cappella* music in worship assemblies, observance of the Lord's Supper each Sunday, the priesthood of all believers, rejection of man-made creeds, and the practice of believer's baptism for remission of sins. Congregational autonomy has resulted in a broad range of interpretation as reflected in worship styles that range from very formal to very informal, and in varied beliefs regarding the exclusivity of the church. The term "Churches of Christ" is more appropriate than "Church of Christ" because of this congregational autonomy. Unlike denominations with central organizations that exert influence over individual churches and associated organizations, centers of influence among Churches of Christ tend to be universities, lectureships, and publications. Nineteen colleges and universities are associated with the Churches of Christ. Of these colleges and universities, Lipscomb represents the broadest range of thought that characterizes these churches, with more than seventy individual congregations represented among its teaching faculty and staff. Churches of Christ today include more than two million adherents worldwide, with congregations in most nations.

C. Development of Mission

The founders referred to their educational design as a "complete education." Rather than a "finished" education, this vision focuses on the comprehensive development of each student – spiritually, intellectually, socially, and physically – as represented in today's mission statement: "Lipscomb University is a private coeducational institution whose principal focus is undergraduate education in the liberal arts and sciences, combined with a number of preprofessional fields and master's degree programs. Its primary mission is to integrate Christian faith and practice with academic excellence. This mission is carried out not only in the classroom but also by involvement in numerous services to the church and the larger community." Catalog, 2002-03, at 7-8.

The first "wing" of this distinctive, integrated mission, "Christian faith and practice," is approached in several ways. Daily Bible classes and chapel are required for all full-time students. Instructors are encouraged to present a "faith-informed" perspective – the notion that all truth is God's truth and that all knowledge and skills are to be used to God's glory, regardless of the individual's career or life path. Two Scholars in Residence for Christian Studies each year focus on faith-informed learning and provide resources that assist instructors in this pursuit. Students are encouraged to participate in service organizations, and social organizations are encouraged to make service projects central to their activities. Lipscomb offers more than seventy student organizations. Students are also encouraged, while not required, to be active in churches of their choosing, and domestic and international mission programs create additional opportunities for students to exhibit their faith and use their abilities for the good of others. "We want to draw our students into a learning environment that addresses the heart and the mind, and in doing so, to help our students take their faith and begin to understand how to use it in their daily lives. We don't want them to see life as

being fragmented, with their campus life, spiritual life, and academic life as separate components. Instead, we want to teach our students to see life as a whole. We want them to see, act and think like the whole person God made them to be," said Provost Craig Bledsoe (http://academics.lipscomb.edu (last visited Jan. 17, 2003)).

Colossians 3:23-24 says, "Whatever you do, work at it with all your heart, as working for the Lord, not for men, since you know that you will receive an inheritance from the Lord as a reward." Colossians 3:23-24 (New Living Translation). From this spiritual imperative grows the second wing of Lipscomb's mission – academic excellence. Lipscomb is strategically committed to be a nationally recognized Christian university with a premier academic program, encouraging the highest level of performance and service among employees and students. Students are taught by faculty who combine the highest academic preparation with ongoing practical experience and scholarship. Class sizes encourage faculty and students to create relationships that are constructive, beneficial, and personal, and to maintain these relationships throughout life. Academic programs prepare graduates for roles of superior leadership and service in their chosen professions and an enthusiasm for lifelong learning. These programs also encourage students to develop a sense of world citizenship through a geographically and ethnically diverse student body, wide-ranging cultural and professional growth opportunities afforded by the city of Nashville, study-abroad curricula, and foreign mission programs. Classes and a broad program of intramural and intercollegiate athletics encourage the awareness of physical health and growth, and the concepts of leadership, teamwork, sportsmanship, and selflessness.

A comprehensive recitation of historical examples of the consistency and impact of this integration of Christian faith and practice with academic excellence would be prohibitively lengthy, but consider these examples:

• In the 1920s, a church was established by Lipscomb faculty in downtown Nashville that provided shelter and food to persons displaced during the Great Depression years.

• By 1941, Nashville Bible School/David Lipscomb College had influenced the establishment of twenty-three educational institutions, including Pepperdine University, Abilene Christian University, and Harding University.

• In 1954, Lipscomb's International Relations Club hosted a three-day model United Nations Assembly featuring delegates from fifteen mid-South colleges and universities.

• In 1969, Lipscomb student Michael F. Adams, a member of the campus Circle K service organization, was elected president of Circle K International. Lipscomb's Circle K and K-ette programs were the largest campus chapters in the nation for much of the 1970s. Today Adams is president of the University of Georgia, one of approximately twenty alumni who have served as college or university presidents.

• In 1989, a marketing class designed a project by which relief supplies would be gathered, including food and medicines, and shipped with U.S. government assistance to Eastern European countries after the fall of the Berlin Wall. The project was so successful that it grew into a non-profit organization, Healing Hands International, which has distributed more than $47 million in humanitarian aid throughout the world. Faculty and students continue to be instrumental in the success of this organization.

• In fall 2002, more than 300 incoming freshmen participated in local community service projects their first week on campus, as part of an orientation program designed to stimulate an understanding of individual responsibility to the community and a desire to participate. More than 400 students are committed to domestic and international mission and service trips during the present academic year, with activities ranging from medical assistance to house building to evangelism. Another class project, requested by the Metro Nashville Public

School system, provided suggestions for increasing parent participation in schools.

D. Academic Excellence and Relevance

The academic excellence that characterized the founders' vision has been a driving force for each successive administration. The college attempted an advance to senior college status in the late 1920s and awarded several bachelor's degrees, but the Great Depression thwarted that initiative. Following World War II, however, this goal was achieved and the college graduated its first senior class in 1948. In 1954, the Commission on Colleges of the Southern Association of Colleges and Schools (SACS) granted accreditation to the college. SACS is a federally sanctioned accrediting body for all institutions in its region – the eleven southern states of the United States and Latin America. The federal government requires educational institutions to be accredited by a regional body such as SACS before institutions are permitted to receive any federal assistance, from building loans to federal student aid. Lipscomb has been granted reaffirmation of accreditation in each ten-year period since its initial accreditation, and in 1988 was granted Level III, or master's degree, status. At that time the institution was renamed Lipscomb University. To receive SACS accreditation, Lipscomb's education quality must undergo careful examination. SACS reviews are conducted by external evaluators who examine curricula offered, qualifications of the faculty, and whether there are sufficient, properly credentialed faculty in each degree program offered by the university; admission procedures and standards, degree requirements, adequacy of financial support, adequacy of facilities, equipment and instructional support for each program; and adequacy of library materials.

In addition to SACS accreditation of the comprehensive educational program, Lipscomb also holds specialized accreditations and approvals in specific areas. These areas include Social Work, accredited by the Council on Social Work Education; the Department of Music, an accredited national

member of the National Association of Schools of Music; the College of Business, accredited by the Association of Collegiate Business Schools and Programs; the Teacher Education Program, approved by the Tennessee State Board of Education and nationally accredited by the National Council for Accreditation of Teacher Education; the Didactic Program in Dietetics, approved by the American Dietetics Association; developmental accreditation of the dietetics internship program by the American Dietetics Association; the Athletic Training Program, accredited by the Commission on the Accreditation of Allied Health Education Programs; and the Professional Chemistry Major, approved by the Committee on Professional Training of the American Chemical Society.

Lipscomb University today offers more than 100 programs leading to bachelor's degrees in five academic colleges and twenty-four departments, featuring more than 800 specific courses. Graduate programs lead to master's degrees in three areas: biblical studies, business administration, and education. An undergraduate evening program is also offered for non-traditional students. On average, approximately 2600 students are enrolled annually in undergraduate and graduate programs. (Approximately 1500 are enrolled in Lipscomb's K-12 academy.) Unlike many institutions widely recognized for quality that employ teaching assistants and graduate students as classroom instructors, classes at Lipscomb are taught by professional faculty, eighty-five percent of whom hold terminal degrees in their teaching emphases. While many of Lipscomb's 109 full-time faculty hold undergraduate degrees from institutions associated with Churches of Christ, their terminal degrees have been awarded by fifty-four different institutions, only one of which is associated with Churches of Christ. This breadth of preparation further illustrates the quality and integrity of the academic program at Lipscomb. Catalog, 2002-03. For nine consecutive years, Lipscomb has been ranked in the top tier of *U.S. News and World Report*'s "Best Universities-Master's" list and other appropriate *U.S. News* rankings.

Students graduating from Lipscomb University during the 2000-2001 academic year, the most recent year for which complete statistics are available, were accepted for graduate or professional study by forty-six institutions, suggesting that a Lipscomb degree represents the high-quality, relevant preparation required for admission. An example of Lipscomb's commitment to adding programs that benefit underserved academic needs and the quality and relevance of such programs is the new Raymond B. Jones School of Engineering. Of the first two engineering graduates, who completed their requirements in May 2002, one was accepted for graduate study with all expenses paid to Harvard University. The second was accepted on a full research assistantship to Vanderbilt University. In addition to its own engineering majors, Lipscomb offers dual-degree programs with Auburn University, Tennessee Technological University, the Nuclear Engineering Department at the University of Tennessee at Knoxville, and Vanderbilt University.

The largest percentage of Lipscomb graduates earns degrees in Business. The "Big 4" accounting firms aggressively recruit Lipscomb graduates, some of whom are now partners in these firms. The chair of the Department of Accounting is a member of the Tennessee State Board of Accountancy, the state regulating board for the accounting industry. Coursework taught at Lipscomb satisfies state requirements to sit for the Certified Public Accountant examination, and for continuing education credit required by the state. The second largest percentage of graduates earns degrees in Education, and Lipscomb courses meet state requirements for licensure. More than 800 Lipscomb graduates are teachers in Tennessee public schools. Because this program is approved by the State of Tennessee, graduates may also teach in forty-five other states with which Tennessee has reciprocal agreements. The fastest growing academic area since 1995 has been the College of Bible, and Lipscomb was the first institution associated with Churches of Christ to offer a children's ministry concentration in its Bible major. Many students attend Lipscomb be-

cause of its exceptional rate in placing graduates into medical and medically related schools. At the conclusion of the 2001-2002 academic year, 100% of students applying to medical schools during the year were accepted. Ninety-seven percent of all students applying to medical or medically related schools were accepted. These statistics demonstrate that Lipscomb programs meet or exceed established standards for entering medical professions following completion of applicable medical, nursing, or medically related professional programs. Lipscomb offers a joint bachelor's degree program in nursing with Belmont University, and a joint program that leads to bachelor's and master's degrees in nursing from Vanderbilt University. Lipscomb also offers a joint program in medical technology with Vanderbilt. Substantial numbers of graduates enter a wide range of other professions, including law and public service. Many of these graduates enter careers in the Nashville area, serving the public good by contributing to economic health and quality of life in the community.

E. Facility Growth and Development

Throughout its history, Lipscomb University's facilities have been expanded and enhanced as would be expected of a leading educational institution. Significant facility expansion and improvement have resulted from student body growth, addition or enhancement of educational programs to meet heightened educational demands of a changing world, and technological advancements. Anticipating a large influx of returning World War II veterans and a move to senior college status, the Lipscomb Expansion Program began in 1944, resulting in the addition of College Hall (now Burton Bible Building), McQuiddy Gymnasium, Crisman Memorial Library, temporary science facilities, and new and expanded residential facilities, by 1952. Fanning Hall, a women's residence, High Rise Dormitory for men, McFarland Hall of Science, and the Dining Center were added in the 1960s. Another wave of construction resulted in Yearwood Hall, a women's

residence, in 1983, and the Axel W. Swang Center for Business Administration in 1984.

The 1986 reaffirmation of accreditation by the Commission on Colleges of the Southern Association of Colleges and Schools noted a dramatic need for new facilities to replace the aging Crisman Library and to provide recreational and physical education space. These facilities were included in an initiative that was substantially complete by the university's centennial in 1991 and resulted in Beaman Library, the Student Activities Center, an addition to the Swang Center, renovation of Crisman for use as an administration building, installation of a campus-wide fiber-optic data network, and a variety of campus beautification projects. Since 1997, Elam, Sewell and High Rise residences have been renovated, the Dining Center was "reinvented" into a true Student Center, and Allen Arena, a 5028-seat multipurpose facility, opened in October 2001. Yearwood Hall was eliminated in the construction of Allen Arena.

F. Conclusion

The key point to derive from these evidences of quality is that Lipscomb's commitment to Christian values serves to enhance the pursuit of excellence in all areas. Lipscomb delivers Christ-centered liberal arts and professional education for students and parents of all backgrounds who seek a premier academic program in a Christian context to prepare graduates for lives of superior leadership and service. Students are taught from a faith-informed perspective by highly trained and experienced faculty who encourage scholarship and spiritual exploration in a location that enhances education, resulting in preparation of the total individual for life and eternity.

II. Procedural History

1. In early 1991, respondent Industrial Development Board (the "Board") of the Metropolitan Government of Nashville and Davidson County ("Metro") issued the tax-

exempt bonds at issue in this case in the aggregate principal amount of $15,000,000 (the "Bonds"). The Bonds were issued to the public pursuant to the Board's authority under Tenn. Code Ann. § 7-53-101(11)(A)(vii) for the financing of "[a]ny nonprofit educational institution in any manner related to or in furtherance of the educational purposes of the institution." Lipscomb, as an institution of unimpeachable academic excellence, satisfied all of the procedural and other legal requirements of the Board.

The government's role was ministerial. The Bonds were sold to private investors (bondholders), and the proceeds from the Bonds were loaned to Lipscomb, pursuant to loan documents by the Board, without recourse against or warranty by the Board. The loan documents were assigned to the predecessor in interest of respondent NationsBank/Tennessee ("NationsBank"), as trustee for the bondholders. Lipscomb is unconditionally obligated under the loan documents to pay all sums due on the Bonds, and neither the Board nor Metro has any further involvement with the Bonds or with Lipscomb in connection with this transaction. NationsBank is responsible for enforcing the loan documents. Repayment of the Bonds is secured by a letter of credit issued by NationsBank which, in turn, is secured by Lipscomb's credit and a mortgage on Lipscomb's property.

Pursuant to federal law – which does not discriminate against institutions that further important social purposes because they are institutions of faith – the income earned on the Bonds by the bondholders is exempt from federal and state income tax under relevant provisions of the Internal Revenue Code and the Tennessee Code. Because of the tax-exempt status of the Bonds, in the marketplace for these types of investments the Bonds carry a lower interest rate than would be the case if the interest were taxable. Accordingly, the loan to Lipscomb of the proceeds realized from the sale of the Bonds in the open market carries a lower interest rate than would be charged if the Bonds were taxable.

No taxpayer money has gone to Lipscomb. The Bonds do not constitute an indebtedness of either the Board or Metro. Under no circumstances will the Board or Metro become liable to pay any portion of the principal or interest on the Bonds or any costs incidental to their issuance. The Bonds do not involve any expenditure of public funds, any reimbursement by the Board of expenditures made by Lipscomb, or any commitment or extension of credit by the Board. The Board is a mere conduit of private investor money through which educational institutions (and other entities), such as Lipscomb, may borrow funds on the basis of their own credit and security at a more favorable interest rate than that available through more conventional financing. That borrowing is available without regard to the religious affiliation of an otherwise worthy institution.

The Bond documents restrict the use of the Bond proceeds that were loaned to Lipscomb. The proceeds were used to further Lipscomb's mission as an institution of academic excellence. The Bond proceeds were used only for certain designated secular construction projects, including a new library, a new intramural athletics building, certain athletic fields, an addition to the Lipscomb Business Center (its business school), computer fiber-optic equipment, and renovation of the old library into administrative offices. None of the proceeds from the Bonds could be used for constructing, renovating or equipping Lipscomb's Chapel or any other place of religious worship, Lipscomb's Department of Bible, or any other place of sectarian or divinity instruction, or any place for training of ministers or other similar persons in the religious field.

2. Petitioners are residents of Davidson County, Tennessee. On May 30, 1991, shortly after the Bond transaction was closed, petitioners filed their complaint in this action in the U.S. District Court for the Middle District of Tennessee. Petitioners' position throughout the case has been that Lipscomb is "pervasively sectarian" and, for that reason alone, the Bond

financing violated the Establishment Clause of the First Amendment. Petitioners' position is thus that pervasively sectarian institutions such as Lipscomb are *uniquely forbidden* in this country from receiving financing on equal footing with other entities.

The district court held that the issuance of the bonds violated the Constitution's Establishment Clause. At the outset, the district court concluded that, on the basis of Lipscomb's principles, the University is a "pervasively sectarian" institution. Pet. App. 115a-129a. The district court then held the bond financing unconstitutional because the government was the source of the loan, Lipscomb was the beneficiary, and the Bonds were direct rather than indirect aid. Although recognizing that the "loan came from [the bank] and was repaid to [the bank]," the court deemed dispositive that nominally "it was still a loan from the Board" (*id.* 132a) and "Lipscomb intentionally sought governmental financing instead of private financing" (*id.*).

The district court also expressed its concern that restrictions on use of the bond proceeds for sectarian purposes would not be enforced, given that the government had "remov[ed] itself from the details of the financial transaction." Pet. App. 154a. Thus, under the loan instruments, the government was absolved of "responsibility for enforcing the use restriction." *Id.*

Finally, the district court concluded that the bond financing would be perceived as a governmental endorsement of religion. The bond paperwork, the court explained, "would clearly connect the Board to Metro and both to the project benefiting David Lipscomb University." Pet. App. 165a. Because that paperwork also acknowledged Lipscomb's pervasively sectarian nature, it sends a message that the government "is endorsing the sectarian beliefs and teachings of Lipscomb University." *Id.* 167a.

Accordingly, the district court entered "[a] permanent injunction * * * prohibiting the Industrial Development Board

and Metropolitan Government from issuing additional tax-exempt bonds to Lipscomb or bonds to any other pervasively sectarian institution." Pet. App. 168a.

3. A divided panel of the Sixth Circuit reversed. The majority noted at the outset that every court confronted with a similar program has "found that the issuance of industrial revenue bonds is not tantamount to the giving of direct aid to religious schools." *Id.* 11a n.4.

The panel majority focused on the form and substance of the bonds: they "do not constitute an indebtedness" of the government; the government cannot "be held liable to pay any portion of the principal or interest * * * or any costs incident to their issuance"; and no "tax revenues have been or will be spent as a result." Pet. App. 4a. The institution seeking the bonds must itself "arrange the financing by locating exclusively private lenders of the funds." *Id.* 23a. Further, "the Board provides [such] pass-through or conduit financing services to a wide variety of nonreligious and religious non-profit organizations." *Id.* 18a. Although the government must formally issue the bonds, that "stems from the simple fact that the Internal Revenue Code excludes from income taxation only interest paid on industrial revenue bonds issued and approved by a state or local governmental unit." *Id.* 24a.

The majority concluded that the bond program is most analogous to a neutral tax exemption, which this Court has long held "is not sponsorship" of religion (*Walz* v. *Tax Comm'n*, 397 U.S. 664, 675 (1970), *quoted in* Pet. App. 18a), or to a "general governmental benefit[]" that is consistent with the Establishment Clause (*Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993), *quoted in* Pet. App. 26a). The majority also recognized that the bond program offended no constitutional principle under the "modified *Lemon* test." Pet. App. 26a-27a (citing *Zelman* v. *Simmons-Harris*, 122 S. Ct. 2460, 2476 (2002) (O'Connor, J., concurring)). "As to the primary purpose, industrial revenue bonds advance a clear governmental, secular interest in promoting economic and

educational development." *Id.* 27a. "As to the program's primary effect, tax free revenue bonds have neither the effect of advancing or inhibiting religion," but rather produce "economic and educational development." *Id.* 28a. "Similarly, * * * the objective observer of Metro's industrial revenue bond program, knowing the history and context of this program, would reasonably view it as one aspect of a broader undertaking to finance economic development, not as an endorsement of religious schooling in general." *Id.* 29a.

Judge Clay, arguing in dissent that the bond financing was unconstitutional, deemed it "sufficient that the government makes it possible for [a pervasively sectarian] institution to obtain economic aid that it would not otherwise be able to obtain without the government's direct participation." Pet. App. 73a. "That no governmental funds actually reach the coffers of the pervasively sectarian educational institution does not alter for one moment the fact that a direct economic benefit accrues to such an institution as a result of the government's active participation in arranging for a low-cost loan that enables the institution to advance its sectarian mission." *Id.*

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied. Although the question presented is of indisputable importance, there is no conflict in the lower courts. Because the law is already uniform, this Court's intervention is not necessitated. The court of appeals' decision furthermore adheres to this Court's Establishment Clause precedents. The conditional cross-petition of the Metropolitan Government, which in any event does not seek to alter any portion of the judgment below, should accordingly be denied as well.

1. Petitioners assert that the petition presents an important and recurring question of federal law. That is correct because the availability of tax-exempt bond financing is nothing less

than essential to the ability of a wide variety of institutions to undertake capital improvement projects.

For more than 110 years, Lipscomb University and its predecessors have endeavored to offer a liberal arts curriculum of the very highest quality that is furthermore founded on the Bible and the teachings of the Churches of Christ. But the University is not merely an intellectual and spiritual space. It requires facilities – such as an excellent library, a gymnasium for athletics, expanded classrooms, and enhanced technology – to continue to thrive and fulfill its mission for students, faculty, and the community. Lipscomb, like most colleges and universities of its size, lacks the endowment required to finance large-scale capital improvements of this sort without lending. Private financing is therefore essential and, as a simple matter of economics, the interest rate available on that lending has direct consequences for the amount of financing the University can secure. In this case, for example, the availability of tax-free bonds saved Lipscomb thirty percent on the financing cost of the capital improvement project.

Although the question presented – which addresses whether the Constitution forbids entities such as Lipscomb University from receiving tax-free bond financing on equal terms with secular institutions – is thus important, not every important question of federal law is reviewed by this Court immediately, if ever. Petitioners cannot, and candidly do not, argue that the question is the subject of a conflict in the lower courts. To the contrary, it is undisputed that every court to consider the question has "found that the issuance of industrial revenue bonds is not tantamount to the giving of direct aid to religious schools." Pet. App. 11a n.4. The majority below identified nearly a dozen decisions so holding since 1968, including most recently *Virginia College Building Authority* v. *Lynn*, 538 S.E.2d 682 (Va. 2000). Such a uniform line of lower court authority itself belies petitioners' claim that the Sixth Circuit's decision conflicts with this Court's precedents.

Nor is review warranted on the ground that "[n]o other *federal appeliate* court * * * has addressed the issue of whether a local government's issuance of tax exempt revenue bonds to finance a low interest loan to a pervasively sectarian educational institution constitutes direct aid that violates the Establishment clause." Pet. 17 (emphasis added). The Fourth Circuit has decided a similar question in a manner consistent with the decision below, holding that the Establishment Clause is not violated by a state aid program that utilizes similarly neutral criteria and that includes safeguards against the diversion of funds, even when the aid is provided to a pervasively sectarian college. *Columbia Union College* v. *Oliver*, 254 F.3d 496 (2001). But in any event, the fact that a question has not percolated in the lower federal courts is an established ground for denying certiorari. That result is warranted when, as in this case, there is no asserted basis for requiring this Court's immediate intervention.

2. Nor is there merit to petitioners' argument that certiorari should be granted because the decision below purportedly conflicts with *Tilton* v. *Richardson*, 403 U.S. 672 (1971), *Hunt* v. *McNair*, 413 U.S. 734 (1973), or *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976). To the contrary, as petitioners elsewhere contend, the question presented "has not been" decided "by this Court." Pet. 17 (title). Further, *Tilton*, *Hunt*, and *Roemer* could present no conflict with the ruling in this case, for each of those decisions *sustained* programs that provided aid to religious institutions. See *Roemer*, 426 U.S. 736 (government per-student subsidy); *Tilton*, 403 U.S. 672 (government construction grants); *Hunt*, 413 U.S. 734 (bond financing).

Although petitioners are correct that the bond financing in *Hunt* resembles the program at issue in this case, the relevant point is that this Court strongly indicated that such a program presents no constitutional concern even when the recipient is a pervasively sectarian institution:

> The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "government service." The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit."

413 U.S. at 745 n.7. The Sixth Circuit properly recognized that the government played the indistinguishable role of a "mere conduit" in the bond financing at issue in this case.

Petitioners thus actually rely on *Tilton*, *Hunt*, and *McNair* for the basic proposition that the government may not provide "direct aid" to a pervasively sectarian institution. That is a hotly debated issue to be sure (see *Mitchell* v. *Helms*, 530 U.S. 793 (2000)), but it is not one presented by this case. The Sixth Circuit recognized that the lower courts "are still bound by pre-*Mitchell* law with regard to the pervasively sectarian doctrine." Pet. App. 14a. See also *id.* 15a ("It is for the Supreme Court, not this Court, to jettison the pervasively sectarian test, which it has not done."). Petitioners' contention that the court of appeals "failed to hold that local government[s] cannot provide direct financial aid to a pervasively sectarian institution" (Pet. 9) thus simply mischaracterizes the decision below.

As petitioners elsewhere acknowledge, the court of appeals actually rejected their constitutional challenge because

"the nature of the aid conferred by the tax exempt revenue bonds is not direct and the revenue bond program does not present the perception of government endorsement of religion." Pet. 9. That holding presents no conflict with *Tilton*, *Hunt*, or *McNair*, which did not consider the dividing line between "direct" and "indirect" aid or any relevant issue relating to endorsement. The only exception is that, as noted, *Hunt* suggested that a bond program such as the one at issue in this case presents no issue under the Establishment Clause.

Petitioners' contrary reliance on *Rosenberger* v. *Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), is misplaced. This Court in *Rosenberger* cited *Hunt* as one in the line of cases establishing "the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." 515 U.S. at 842. But petitioners make an extraordinary leap in contending that this statement in *Rosenberger* "implicitly recognized the bond proceeds loan structure in [*Hunt*] as an example of direct state aid." Pet. 12. Nothing in this dictum from *Rosenberger* purported to characterize the program at issue in *Hunt* as "direct aid."

Citing no decision of this Court, petitioners nonetheless assert that the financing received by Lipscomb "provided a direct financial benefit which had the principal or primary effect of advancing religion." Pet. 11. This argument, however, elides the very distinction between direct and indirect aid, for receiving a "direct financial benefit" is not the same thing as receiving that benefit "directly from the government." Indeed, it is a stretch to characterize the government's role in the bond financing as "aid" at all. Although the federal tax laws required the Board and Metro to formally approve the Bonds, the financing is entirely private, it was arranged by Lipscomb, and no one has recourse in any respect against the government.

Petitioners thus err in attempting to characterize the bond financing as "not a passive benefit but rather * * * similar to a

general subsidy." Pet. 12. Petitioners rely only on Justice Brennan's concurrence in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970). But even that solo opinion rejects petitioners' argument: "A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from the taxpayers as a whole." *Id.* at 690. The Bonds, of course, were financed with purely private, not taxpayer, funds, as petitioners concede. Pet. 13 ("no state funds were transferred through [the] revenue bond financing employed in this case").

Again citing no decision of this Court, petitioners next attempt to fault the bond financing as purportedly "result[ing] in excessive governmental entanglement with the religious mission of the University." Pet. 14. But even the district court recognized that the Bonds were immediately assumed by private entities such that the Board and Metro have no ongoing role in their administration or collection. Pet. App. 154a. Indeed, petitioners themselves embrace the district court's conclusion that "the government has abdicated any responsibility for enforcing the use restriction." Pet. 14-15.

Petitioners' argument thus seems to be instead that "no safeguard can ensure that direct monetary aid, even if designated to fund the school's secular activities, will not aid its religious mission." Pet. 14. Even if it were correct that the bond financing at issue in this case indirectly advanced Lipscomb's sectarian activities, that is not "entanglement." Instead, it is simply a restatement of petitioners' flawed premise that the Bonds represent "direct" governmental aid.

Finally, there is no merit to petitioners' argument that "the perception of a reasonable observer would be that the Board and Metro were endorsing Lipscomb and its sectarian purpose and beliefs." Pet. 15. Petitioners rely entirely on the fact that the formal approval documents describe Lipscomb and its mission. *Id.* The Sixth Circuit correctly recognized, however, that "the objective observer of Metro's industrial revenue bond program, knowing the history and context of this

program, would reasonably view it as one aspect of a broader undertaking to finance economic development * * *. Metro no more endorsed Lipscomb University than it did Wal-Mart in issuing industrial revenue bonds." Pet. App. 29a.

Nor can petitioners' arguments be reconciled with this Court's leading recent Establishment Clause precedents. Like the voucher program in *Zelman* v. *Simmons-Harris*, 122 S. Ct. 2460 (2002), the bond financing program at issue in this case is neutral as between secular and sectarian institutions. It furthermore rests on the decision of private banks to finance the Bonds and the further private decision of individuals to purchase the Bonds. The government's "role ends with the disbursement of benefits." *Id.* at 2467. Indeed, the only relevant distinction between *Zelman* and this case is that the vouchers were paid with public monies while the Bonds were not.

Petitioners' position is also precluded by *Mitchell* v. *Helms*, 530 U.S. 793 (2000). Like the educational assistance program sustained in *Mitchell*, the bonds at issue in this case are awarded based on wholly neutral criteria. Further, the financing received under the Bonds is entirely secular and safeguards exist to ensure that funds are not diverted to religious uses. The critical difference is that this case, unlike *Mitchell*, does *not* involve "direct" aid to religious institutions.

3. Because the petition for certiorari should be denied, the conditional cross-petition of the Metropolitan Government should be denied as well. See S. Ct. R. 13.4. But in any event, the cross-petition should be denied because it does not "seek[] to change the judgment below or any part thereof." Robert L. Stern et al., *Supreme Court Practice* § 6.35, at 444 (8th ed. 2002). The Metropolitan Government urges this Court to decide that indirect governmental aid "may be used for religious purposes" by pervasively sectarian institutions. Cross-Pet. i. But because the court of appeals ruled that the bond program at issue in this case does not offend the Estab-

lishment Clause, a holding in Metro's favor by this Court on the question presented by the cross-petition would not have the effect of altering the judgment below.

CONCLUSION

For the foregoing reasons, the petition for certiorari and the conditional cross-petition of the Metropolitan Government should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

HAROLD E. STEELE, DON PETERSON,
REV. DAVID MAYNARD, HARMON WRAY,
AND REV. TOM BAKER, JR.,
Petitioners,

v.

INDUSTRIAL DEVELOPMENT BOARD OF
METROPOLITAN GOVERNMENT OF NASHVILLE AND
DAVIDSON COUNTY, METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY,
DAVID LIPSCOMB UNIVERSITY,
NATIONSBANK AND NATIONSBANK/TENNESSEE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PRELIMINARY STATEMENT

Ordinarily, counsel would not file a Reply Brief. However, the Brief in Opposition filed on behalf of David Lipscomb University ("Lipscomb") contains a number of statements which require a response. The purpose of this Reply Brief is to direct the Court to certain arguments made by Lipscomb in order to set the record straight. Petitioners are hopeful that this Reply Brief will be filed with the Court in time for it to be considered with the other briefs at the time the Court determines whether to grant the Petition for a Writ of Certiorari in this case. Petitioners submit that considerations of fundamental fairness require that the Court consider Petitioner's reply to various statements contained in the Brief in Opposition filed on behalf of Lipscomb.

LIPSCOMB'S STATEMENT OF THE FACTS

The majority of the facts stated in the Brief in Opposition, pp. 1-12 are not supported by any citation to the record and, in fact, are outside the record. Moreover, many of these "facts" relate to Lipscomb's perception of itself today and not at the relevant time when the subject revenue bonds were issued more than ten (10) years ago. See Habel v. Industrial Dev. Auth., 400 S.E.2d 516 (Va. 1991).

In regard to the facts, the controlling consideration is that in resolving the cross-motions for summary judgment, the trial court determined that based on the undisputed facts, Lipscomb was so pervasively sectarian that the tax exempt bond issue had the primary effect of promoting religion. App. B. 115a-129a. The pervasively sectarian status of Lipscomb is a finding of fact which was not disturbed by the Court of Appeals. This Court has traditionally been reluctant to disturb findings of fact in which the two lower courts have concurred. Rogers v. Lodge, 458 U.S. 613, 625 (1982).

Since there has been no argument presented that the trial court's findings of fact are clearly erroneous, for purposes of this appeal, Lipscomb must be deemed to be a "pervasively sectarian" institution.

REPLY TO LIPSCOMB'S ARGUMENT FOR DENYING THE WRIT

1. Lipscomb argues that the majority opinion of the Court of Appeals does not conflict with Tilton v. Richardson, 403 U.S. 672 (1971), Hunt v. McNair, 413 U.S. 734 (1973), or Roemer v. Board of Public Works, 426 U.S. 736 (1976). Br. in Opp. 19. Petitioners disagree.

Lipscomb argues that in Hunt, "the relevant point is that this Court strongly indicated that such a program (revenue bond financing) presents no constitutional concern even when the recipient is a pervasively sectarian institution." Br. in Opp. 19. In support of this statement, Lipscomb quotes only a portion of footnote 7 of the Hunt opinion without indicating that it was not quoting the entire footnote.

The entire footnote 7 of the Hunt opinion follows with the portion omitted by Lipscomb underlined:

> "7. The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State of expenditure made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds

> or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." *Clayton v. Kervick*, 56 N.J. 523, 530-531, 267 A2d 503, 506-507 (1970). The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit." 258 S.C., at 107, 187 S.E.2d, at 650. Because we conclude that the primary effect of the assistance afforded here is neither to advance nor to inhibit religion under *Lemon* and *Tilton*, we need not decide whether, as appellees argue, Brief for Appellee 14, the importance of the tax exemption in the South Carolina scheme brings the present case under *Walz v. Tax Comm'n*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), where this Court upheld a local property tax exemption which included religious institutions."
>
> 413 U.S. at 745, n. 7.

The reason why the Hunt court concluded the revenue bonds did not advance or inhibit religion is that it had been determined that the beneficiary of the revenue bond funding, the Baptist College at Charleston, was not a pervasively

sectarian institution. 413 U.S. at 743-744. However, the Hunt court, in its opinion, noted that "[A]id normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." 413 U.S. at 743.

In cases since Hunt, this Court has implicitly recognized the bond issue loan structure in that case as an example of direct state aid. See Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 842 (1995) (citing Hunt as one of the cases correctly cited by the Court of Appeals as establishing "the principle that we have recognized special Establishment Clause dangers when the government makes direct money payments to sectarian institutions") see also Mitchell v. Helms, 530 U.S. 793, 818 (2000) (plurality opinion) (citing Rosenberger); Id. 530 U.S. at 841-844 (citing Rosenberger for the proposition that "[T]his Court has recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions.") (O'Connor, J., concurring in judgment).

Petitioners respectfully submit that this Court has recognized special Establishment Clause dangers arise when the government makes direct money payments to a sectarian institution such as Lipscomb. As the trial court held in this matter, the Loan Agreement was between the government and Lipscomb. App. B., 138a. The money went directly to Lipscomb in the form of a loan from the Industrial Development Board of the Metropolitan Government of Nashville and Davidson County (the "Board"). Id. The decision to loan the money by the government to Lipscomb

was not ministerial. As the trial court noted, in order to approve the bond issue for tax exemption, the Board had to find that the bond issue served a legitimate public purpose and/or created a substantial public benefit. App. B., 97a. This is simply not a ministerial function as claimed by Lipscomb, but instead involves the exercise of discretion by the government.

Petitioners submit that a Writ should be granted in this case because the majority opinion rendered by the Court of Appeals specifically held that the sectarian nature of Lipscomb is not a relevant consideration in this case. This holding appears to conflict with the Court's previous recognition that special Establishment Clause dangers arise when the government makes direct money payments to sectarian institutions.

This Court has noted that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its decisions." Agostini v. Felton, 521 U.S. 203, 237 (1997). The issue of whether the pervasively sectarian test should be overruled should be decided by this Court, not by a sharply divided panel of the United States Court of Appeals for the Sixth Circuit.

2. Lipscomb argues that "... it is undisputed that every court to consider the question has 'found that the issuance of industrial revenue bonds is not tantamount to the giving of direct aid to religious schools,'" citing the majority Court of Appeals opinion, App. A, 11a, n. 4. Br. in Opp. 18. Petitioners respectfully disagree.

Of the cases cited by the majority Court of Appeals opinion at footnote 4, two of those cases did not apply federal constitutional law, but, rather, involve state constitutional law issues. Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202, 203-204 (1972) app. dism'd for want of sub'l fed'l question. 413 U.S. 902 (1973); and Washington Higher Educ. Facilities Auth. v. Gardner, 103 Wash.2d 838, 699 P.2d. 1240, 1243, 1245-46 (1985). In fact, the Durham case did not even involve tax exempt revenue bond funding, but, rather, a statute authorizing a state agency to guarantee loans at any institution of higher learning.

This is an "as applied" challenge case. Six of the cases cited in the majority Court of Appeals opinion at footnote 4 involve "facial" challenges to the constitutionality of enabling statutes and did not involve a "pervasively sectarian institution" as a beneficiary of the tax exempt bond issue. Nohrr v. Brevard County Educ. Facilities Auth., 247 So.2d 304, 307-309 (Fla. 1971); Cecrle v. Ill. Educ. Facilities Auth., 52 Ill.2d 312, 288 N.E.2d 399, 401 (1972); Opinion of the Justices, 354 Mass. 779, 236 N.E.2d 523, 526-527 (1968); Minn. Higher Educ. Facilities Auth. v. Hawk, 305 Minn. 97, 232 N.W.2d 106, 111 (1975); Vermont Educ. Bldg. Financing Agency v. Mann, 127 Vt. 262, 247 A.2d 68, 72 (1968), app. dismissed, 396 U.S. 801 (1969); and Washington Higher Educ. Auth. v. Gardner, supra.

Of the cases cited in the majority opinion of the Court of Appeals at footnote 4, two cases acknowledge that if tax exempt revenue bond funding was provided to a pervasively sectarian institution, it would probably violate the Establishment Clause. Cortez v. Independence County, 287 Ark. 279, 698 S.W.2d 291, 293-294 (1985); and California Educ. Facilities Auth. v. Priest, 12 Cal.3d 593, 116 Cal. Rptr. 361, 526 P.2d 513, 519, n. 8 (1974).

There is one case in footnote 4, Virginia College Bldg. Auth. v. Lynn, 260 Va. 608, 538 S.W.2d 682 (Va. 2000), which involves an "as applied" challenge to tax free revenue bond financing to a pervasively sectarian institution and which finds that such funding withstands an Establishment Clause challenge.

There is one case that involves tax exempt revenue bond financing, which is not cited in footnote 4 of the majority Court of Appeals opinion, which holds that if such aid is provided to a pervasively sectarian institution, it violates the Establishment Clause, Clayton v. Kervick, 59 N.J. 583, 285 A.2d 11, 21 (1971).

Lipscomb argues that the Fourth Circuit has held that the Establishment Clause is not violated by a state aid program that utilizes similarly neutral criteria and that includes safeguards against the diversion of funds, even when the aid is provided to a pervasively sectarian institution, citing Columbia Union College v. Oliver, 254 F.3d 496 (4th Cir. 2001). Br. in Opp. 19. However, in that case while the Court of Appeals declined to apply a pervasively sectarian analysis, the fact remains that the trial court had determined that Columbia Union College was not a pervasively sectarian institution. 254 F.3d at 508.

Contrary to Lipscomb's assertions, there is not a "uniform line of lower court authority... [that] belies, petitioners' claim that the Sixth Circuit's decision conflicts with this Court's precedents." Br. in Opp. 18.

3. Lipscomb quotes footnote 7 from Hunt v. McNair, supra at 746 for the proposition that tax exempt revenue bonds for a pervasively sectarian institution would not constitute "direct aid" in violation of the Establishment

Clause. Br. in Opp. 19-20. As has been pointed out in this brief at p. 2, Lipscomb did not quote footnote 7 in its entirety in its brief. Br. in Opp. 20. The portion of footnote 7 conveniently omitted by Lipscomb clearly shows that footnote 7 does not support the proposition for which Lipscomb is citing it. Infra., p. 2.

Moreover, the case citations in footnote 7 of the Hunt decision, which Lipscomb omitted from its brief, Br. in Opp. 20, do not support Lipscomb's argument. In Clayton v. Kervick, 59 N.J. 583, 285 A.2d 11, 21 (1971), which was remanded to the New Jersey Supreme Court after Hunt was decided, the Court upheld the validity of the statute authorizing tax exempt revenue bond financing, but also held that "no college may participate if it restricts entry on... religious grounds or requires all students gaining admission to receive instruction on the tenets of a particular faith." 285 A.2d at 27. In other words, revenue bond financing extended to a pervasively sectarian institution is direct aid in violation of the Establishment Clause. Based on the trial court's findings of fact concerning Lipscomb, App. A, 117a-129a, the Clayton court would determine, just as the trial court did, that the tax free revenue bond funding granted by the government to Lipscomb violated the Establishment Clause.

As has been previously pointed out in this brief, this Court has recognized that there are Establishment Clause dangers when the government makes direct money payments to sectarian institutions. Rosenberger v. Rector and Visitors of the University of Virginia, supra at 842; Mitchell v. Helms, supra at 841-844 (O'Connor, J., concurring in judgment). The trial court determined that "it is clear that a direct benefit is precisely what Lipscomb received. The government chose to provide Lipscomb with low interest financing through a Loan Agreement. The government

obtained the funding for the loan by issuing tax exempt revenue bonds and assigned the loan to Sovran Bank, but the loan still came from the Board, and hence, from Metro (the government)." App. A, 138-139a.

Lipscomb argues that the Tennessee statute is facially neutral. However, the trial court noted that because of a "lack of evidence, the Court cannot find, as a matter of law, that the decision to provide financial assistance was made on a neutral basis." App. A, 146a. Lipscomb and the Metropolitan Government of Nashville and Davidson County failed to present evidence that the Board was neutral when it made its decision to issue bonds for the benefit of Lipscomb.

Finally, a key factor in determining whether the aid to Lipscomb had the impermissible effect of advancing religion is whether the aid was given to the religious institution at the discretion of the government or as a result of independent choices of private individuals. See Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993). Where government funds are provided to individuals who then decide to use those funds in support of religious education, the Court has found that there is no government support of religion. See Zobrest, supra at 8-10.

The trial court determined that in the case at bar, it was the Board, not private investors, who decided who would receive the benefit of the sale of the bonds. The private investors could not select which institution they wanted to receive the funds. They merely chose to invest in tax free bonds. App. A., 147a. The government chose to provide Lipscomb with low interest financing through a Loan Agreement. The government obtained funding for the loan by issuing tax exempt bonds and assigned the loan to

Sovran Bank. Nevertheless, the loan was from the government to Lipscomb. App. A, 139a. In short, the government, and not private individuals, decided to confer this direct benefit to Lipscomb, a pervasively sectarian institution.

CONCLUSION

Contrary to Lipscomb's arguments, this case presents a serious Establishment Clause issue which should be decided by this Court.

Respectfully submitted,

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